(2)

No. S00446 (Crim. 22808)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

BRETT PATRICK PENSINGER, Petitioner

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

I.

Did the California Supreme Court violate the Eighth Amendment when, after reversing the torture special circumstance, it upheld the sentence of death without reweighing the surviving special circumstance or conducting a harmless error analysis?

II.

Was the California Supreme Court constitutionally required to reweigh the single surviving aggravating factor against the three mitigating factors?

III.

Did the California Supreme Court's use of evidence of sexual offenses of which the petitioner had been acquitted by the jury violate principles of collateral estoppel protected by the double jeopardy clause of the Fifth and Fourteenth Amendments?

IV.

Do the Fifth and Eighth Amendments also bar the California Supreme Court's use of facts resolved in petitioner's favor?

V.

Did the prosecution's use of and failure to disclosure perjury violate petitioner's right to a fair trial as protected by the Fourteenth Amendment?

VI.

Did the California Supreme Court apply an improper test to determine whether the prosecutor's use of and failure to disclose perjury was harmless?

VII.

Did the prosecution's failure to disclose critical evidence that the mother of the victim was investigated for child abuse and made statements indicating that she did not want the child, violate the due process clause of the Fifth Amendment?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were Petitioner, BRETT PATRICK PENSINGER and Respondent, THE PEOPLE OF THE STATE OF CALIFORNIA.

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Petitioner, BRETT PATRICK PENSINGER, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California, entered in the above entitled proceeding on April 24, 1991.

JUDGMENT BELOW

The order of the California Supreme Court in People vs. Brett Patrick Pensinger, number S004466 and In re: Brett Patrick Pensinger, number S009489 denying petitioner's request for relief is included as appendix A to this petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

The judgment of the Supreme Court of California affirming petitioner's conviction and sentence of death was entered on February 28, 1991. A timely petition for rehearing was filed on March 15, 1991 and on April 24, 1991, the Court denied the petition for rehearing and issued a modification of its original opinion together with the remittitur.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 5:

> "No person shall... be deprived of life, liberty of property without due process of law;"

United States Constitution, Amendment 6:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."

United States Constitution, Amendment 8:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment 14, section 1:

> " ... nor shall any state deprive a person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In July 1982, petitioner was convicted of murder, torture and kidnapping. The special circumstances that the murder was committed during the commission of a kidnapping and infliction of torture were found to be "true". Petitioner was acquitted of two charged offenses; committing a lewd act on a child and oral copulation. The special circumstances of murder in the course of committing a lewd act on a child and oral copulation were found "not true". In August 1982, at the conclusion of petitioner's penalty phase trial, the jury set the penalty at death.

In 1991, the California Supreme affirmed petitioner's convictions and affirmed the special circumstances finding as to the allegation of murder in the course of the kidnapping, reversed the torture murder special circumstance finding and affirmed the penalty determination. It also

denied his writ of habeas corpus which had been consolidate with the appeal. Petitioner's petition for supplemental writ of habeas corpus in State Court Number S009489, challenging his convictions and sentence was consolidated with People vs. Brett Patrick Pensinger, S004466 and denied by the California Supreme Court on September 26, 1990.

STATEMENT OF FACTS

The testimony at trial established that petitioner had met the parents of the victim, Michele Melander, in a bar near the California border in Parker, Arizona, and that he began to drink with them. Petitioner, after several hours, gave the victim's mother, Vickie Melander, a ride in order for her to retrieve her children from a baby-sitter, buy diapers and feed the children. The children were then taken by petitioner and Mrs. Melander to a different bar and left in Petitioner's truck while petitioner and Mrs. Melander continued to consume beer. When petitioner and Mrs. Melander returned to the truck, five year old Michael Melander, Jr., advised his mother that a shotgun in petitioner's truck had been taken by a stranger. Mrs. Melander testified that she and petitioner then drove to a local police station to report the theft. Mrs. Melander stated that when she entered the police station petitioner

remained outside and that when she emerged, petitioner had left with her children. Michael Jr., was found later that evening across the Colorado river in California. Michele's body was found in a California dump six days later. Michael Jr., was unable to identify petitioner either at a lineup or at trial but he did identify the truck that petitioner was driving as the truck in which he and his sister had been riding.

The prosecution's theory at trial was that petitioner was angry over the theft of his gun and that he sexually assaulted, killed and maimed Michele in a burst of anger. The defense suggested, without much force, that Mrs. Melander, an alcoholic, was somehow involved in the murder of her own child. Mrs. Melander effectively conveyed the idea that she loved her children and was as concerned about the absence of her daughter as much as the absence of her son. (Tr. 2331-2333)[1] and that she was grieving after the child's death (Tr. 2241-2242). Mrs. Melander cried at the end of her direct examination and when confronted about her feelings during her cross examination (Tr. 2331-2333). Mrs. Melander denied that she and her husband had quarreled when

[1] Tr. refers to the trial transcripts from Petitioner's trial.

she brought the children to a bar on the evening of the kidnapping (Tr. 2313-2314). In rebuttal of the defense argument that she either killed or caused the death of her child, the prosecutor argued "what mother would do that to her kid, period?" (Tr. 3842).

After trial, petitioner learned that the prosecution knew that the answer to this question might reflect unfavorably on Mrs. Melander as the prosecution had failed to disclose damaging evidence concerning Mrs. Melander to the defense. The prosecution never provided the defense with information in its possession that, while pregnant with Michele, Mrs. Melander had been investigated for child abuse. The prosecution possessed specific information that South Carolina authorities had investigated a complaint that Mrs. Melander had struck her son Michael Jr. in the face with pliers, had made statements that she did not want to have the baby that she was then carrying and that she would like to place the baby for adoption but that her husband would never agree to that. A copy of the information suppressed by the prosecution is included as Appendix B to this Petition.

All of this information had been gathered by Lexington, South Carolina police at the request of the Arizona and

California authorities and had been forwarded to them prior to Petitioner's trial in a cover letter dated August 12, 1981. This evidence was discovered in material provided to the petitioner after the California Supreme Court ordered an evidentiary hearing (see the declaration of counsel included as Appendix C to this Petition).

During the evidentiary hearing, which took place in June of 1988, the material was marked as an exhibit and identified by the prosecutor. The referee, however, sustained the prosecutor's objection and would not allow any expansion of the hearing to include this issue. Thereafter, petitioner filed a Supplemental Petition for Writ of Habeas Corpus in order to determine if petitioner was denied a fair trial under Brady vs. Maryland 373 U.S. 85 (1963), and its progeny by the suppression of the South Carolina material affecting Mrs. Melander's credibility. The California Supreme Court denied the petition for the supplemental writ without opinion or clarification. (See Appendix D to this Petition)

The jury that convicted petitioner was presented with the testimony of two informers, Gary Howard and David Hicks. Howard had been used as an informant previously by the San Bernardino County Sheriff's Department. Howard testified

that petitioner confessed his crimes to him and that he (Howard) neither desired or requested any consideration for his testimony and cooperation. Prior to Petitioner's trial the prosecutor and members of the county sheriff's department had testified in Howard's behalf at the penalty phase of Howard's murder trial. At the evidentiary hearing ordered by the California Supreme Court, Howard recanted his trial testimony, saying it was all a lie and that petitioner never confessed anything to him (App. E). More importantly, both Howard and the trial prosecutor admitted that Howard had made requests and demands that were not revealed to the jury and that Howard's testimony, that he neither desired or sought anything, was false (App. F). In fact, immediately prior to his testifying at Petitioner's trial, Howard demanded that the prosecutor and the chief investigator assist him in having legal custody of his daughter transferred to his sister. This request was refused but the jury was never told that Howard had made such a request and that his testimony that he didn't want to ask for anything in return for his testimony was false. Despite these facts, the prosecutor told the jury during his guilt phase summation that Howard wanted nothing for his testimony, that he was braving designation as an informer and that his

motives were "fathomless" (Tr.3848).

On review, the California Supreme Court held that "the prosecutor should have corrected the false impression created by the portion of Howard's testimony by disclosing that Howard had unsuccessfully attempted to extort a last minute advantage in return for his testimony." People vs. Pensinger 52 Cal.3d 1210, 1273 (1991). However, the court further found that this failure to disclose was harmless and did not undermine the reliability of the proceedings (Ibid.). The Court did not say that it was convinced beyond a reasonable doubt that the error was harmless but directed the reader to a comparison of decisions of this court (Ibid.). Additionally, the court also found that Howard's testimony was perjurious but similarly dismissed it as harmless error and cited to its earlier discussion on failure to disclose (Id. at 1274).

The other questions for certiorari concern the manner in which the California Supreme Court dealt with factual issues in the resolution of the question of whether there was sufficient evidence to support the first degree murder conviction. The Court affirmed the murder conviction on a premeditation theory applying its own Anderson test which requires either strong evidence of planning, motive or

manner of killing to show deliberation and premeditation. People vs. Anderson 70 Cal.2d 15, 26-27 (1968) However, the Court used facts to support the conviction which had been resolved in petitioner's favor by his acquittals of the lewd act and oral copulation offenses and special circumstances.

The California Supreme Court found that petitioner had planned the offense because "[t]here was evidence that at some point he also sexually abused the body." People vs. Pensinger, supra, 52 Cal.3d at 1237. The Court also found evidence of motive in that petitioner killed the child "in order to have sexual intercourse with her." (Id. at 1239) But the jury, in the guilt phase, had acquitted petitioner of these offenses and found "not true" the special circumstances involving any sexual offenses under California Penal Code section 288.

Finally, the Court in reversing the torture special circumstance because of instructional error, failed to reweigh the existing special circumstance as required by the Eighth Amendment and the due process clause of the Fifth Amendment. The Court held that the invalidity of the torture special did not affect the validity of the surviving kidnapping special.

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA SUPREME COURT VIOLATED THE EIGHTH AMENDMENT WHEN, AFTER REVERSING THE TORTURE SPECIAL CIRCUMSTANCE, IT UPHELD THE DEATH PENALTY WITHOUT REWEIGHING THE SURVIVING SPECIAL CIRCUMSTANCE OR CONDUCTING A HARMLESS ERROR ANALYSIS

The California Supreme Court set aside the torture special circumstance on the grounds that the jury instruction was inadequate. People vs. Pensinger, supra, 52 Cal.3d at 1254-1255. In its original opinion it made no attempt to determine whether or not the torture special circumstance had any effect on the death sentence imposed by the jury on the sole basis of the kidnap-murder special. The Court merely stated "there is no basis for setting aside the kidnap-murder special circumstance." (Id. at 1256.) In petitioner's petition for rehearing it was pointed out that the failure of the California Supreme Court to analyze whether petitioner should still receive the death penalty in view of the validity of a serious aggravating factor violated the Eighth Amendment as interpreted in Clemons vs. Mississippi 110 S.Ct. 144 (1990); Maynard vs. Cartwright 486 U.S. 356 (1988) and Parker vs. Dugger 111 S.Ct.___ (1991).

The Court then attempted to correct this error. On April 24, 1991, in response to the petition for rehearing, the Court held that evidence of the shocking nature of the attack was properly before the jury and that "[t]he erroneous special circumstantial finding was only a 'statutory label' which could not have affected the verdict in light of the evidence properly before the jury." (See People vs. Wade 44 Cal.3d 975 (1988). (Opinion Modification p.2).

The Court's attempt to save the kidnap-murder special circumstance fails because it did not properly engage in either a reweighing or a harmless error analysis. Clemons vs. Mississippi, supra, 110 S.Ct. 144.

California is a "weighing" state. (California Penal Code section 190.3) An automatic rule of analysis in a weighing state is implicated under Lockett vs. Ohio 438 U.S. 586 (1978) and Eddings vs. Oklahoma 455 U.S. 104 (1982). As this Court said in Clemons, a failure to reweigh "would not give defendants the individualized treatment that should result from actual reweighing of the mix of mitigating and aggravating circumstances." Clemons vs. Mississippi, supra, 110 S.Ct at 1450; cf, Barclay vs. Florida 463 U.S. 939, 958 (1983).

There clearly were three statutory mitigating circumstances. The trial court found that petitioner's lack of a felony conviction, his age and his alcohol consumption were mitigating circumstances (Tr. 4180).

The basic flaw in the California Supreme Court's analysis is its mechanical reliance on People vs. Wade, supra, 44 Cal.3d 975. Wade itself relies on this Court's decision involving a Georgia statue in Zant vs. Stephens, 462 U.S. 862 (1983). However, Georgia is not a weighing state. As this Court held in Clemons, the decision in Zant withheld opinion "on the possible significance of a holding that a particular aggravating circumstance is "invalid" under a statutory scheme in which the judgment or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." Zant vs. Stephens, supra, 462 U.S. at 890 cited with approval in Clemons v. Mississippi, supra, 110 S.Ct. at 1446 (emphasis added).

II.

THE CALIFORNIA SUPREME COURT IS CONSTITUTIONALLY REQUIRED TO REWEIGH THE SINGLE SURVIVING AGGRAVATING FACTOR AGAINST THE THREE MITIGATING FACTORS.

Instead of engaging in a reweighing analysis, the

California Supreme Court disposed of this question in two sentences. Citing its earlier decision, the Court held:

"[A]lthough instructional error requires reversal of the torture-murder special circumstance findings, the evidence of the shocking nature of the attack on the infant victim was properly before the jury. The erroneous special circumstance findings was only a 'statutory label' which could not have affect the verdict in light of the evidence properly before the jury." (Opinion Modification P.2).

Aggravating factors created by the legislature in direct response to this Court's decision in Furman v. Georgia 408 U.S. 238 (1972) and Gregg v. Georgia 428 U.S.153 (1976) cannot be callously dismissed as "statutory labels". These aggravating factors serve a special constitutional function mandated by this Court's interpretation of the Eighth Amendment. Neither the jury nor the reviewing appellate court is permitted to create a new aggravating factor i.e. "evidence of [a] shocking nature" and arrive at a sentence of death. The law of "guided discretion" as carefully crafted by this court outlaws such reasoning. Lockett v. Ohio 438 U.S. 586 (1978); Eddings v. Oklahoma 455 U.S. 104 (1982). There is also no discussion of mitigating factors by the California Supreme Court.

This case is identical to Clemons v. Mississippi, supra, 110 S.Ct. 144. This identical error was particularly important in the Court's reasoning in Clemons where the Court held: "Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury we cannot be sure that the Court fully understood our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must therefore, vacate the judgment below and remand for further proceedings, insofar as the judgment purported to rely on the state Supreme Court's reweighing of aggravating and mitigating circumstances." (Id. at 1450.)

The only difference between Clemons and the instant case is that while the Mississippi court was "virtually silent" on the particulars of mitigating evidence, the California Supreme Court was absolutely silent. This failure requires reversal and a remand for a reweighing. The court did not engage in a harmless error analysis. Clemons makes clear that an appellate court which finds that error occurred with respect to instruction on special or aggravating circumstance may find that the error was not harmless. Clemons v. Mississippi, supra, 110 S.Ct. at 1450-

51: Satterwhite v. Texas 486 U.S. 249 (1988). The California Supreme Court did not say that it was applying the harmless error standard. It did not say that it was satisfied beyond a reasonable doubt that the jury would have imposed the same penalty in the absence of the torture special. Finally, there is no analysis or discussion except that there was evidence of the shocking nature of the attack. This is not an aggravating circumstance and does not explain how the surviving aggravating factor, kidnap-murder, outweighs the mitigating circumstances.

In Clemons this Court reversed even though the Mississippi Supreme Court said it was satisfied beyond a reasonable doubt that the jury's verdict would have been the same. Clemons vs. Mississippi, supra, 110 S.Ct. at 1444. This was so because affirmance required "a detailed explanation based on the record..." (Id. at 1451.)

This case is even a more flagrant violation of the Eighth Amendment because there is no evidence that the Court applied the "reasonable doubt" standard required by Chapman v. California 386 U.S. 18 (1967) and because in Clemons "the trial judge had overridden the jury's recommendation to impose a life sentence. Additionally, there is no detailed discussion based on the record explaining why the jury would

have imposed the same sentence.

This Court's recent decision in Parker v. Dugger 111 S.Ct. ___ (1991), demonstrates that appellate courts are constitutionally required to enumerate the impact they give to mitigating evidence. In Dugger the Florida Supreme Court struck two aggravating factors but sustained a sentence of death upon a finding of no mitigating circumstance. However, the trial judge found the existence of mitigating circumstances. This Court held that the Florida Supreme Court was therefore required to consider the effect of the trial court's finding of mitigating circumstances as the state court's failure to do so "deprived Dugger of the individualized treatment to which he was entitled under the constitution." (Id. at 740.) The Court noted, in language particularly apposite here, "[F]ollowing Clemons, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found. What the Florida Supreme Court could not do but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's finding regarding mitigating circumstances, and affirm the sentence based on a misreading of the trial judge's findings." (emphasis added,

Id. at 738.)

The California Supreme Court did not reweigh "based on what the sentencer actually found", it simply substituted its own judgment, finding that since there was evidence of a shocking nature before the jury this evidence outweighed whatever mitigating evidence the jury found.

This Court has repeatedly emphasized the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. Clemons v. Mississippi, supra, 110 S.Ct.144; Gregg v. Georgia, supra, 428 U.S. 153. Therefore, this Court should grant the petition and reverse the judgment of the California Supreme Court and remand for an appropriate weighing of the aggravating and mitigating circumstances. In California without a verdict sheet or special findings a new jury trial is required on the penalty phase questions.

III.

THE CALIFORNIA SUPREME COURT'S USE OF EVIDENCE OF SEXUAL OFFENSES FOR WHICH THE PETITIONER WAS ACQUITTED VIOLATES PRINCIPLES OF COLLATERAL ESTOPPEL AND DOUBLE JEOPARDY GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

The California Supreme Court affirmed petitioner's murder conviction on a premeditation theory. In applying the test it created in People v. Anderson, supra, 70 Cal.2d at 26-27, the court found evidence of planning and motive. People v. Pensinger, supra, 52 Cal.3d at 1237-38. The court found that petitioner planned the offense because "[t]here was evidence that at some point he also sexually abused the body..." (Ibid.) and evidence of motive stating that petitioner killed the child "in order to have sexual intercourse with her." (Ibid.) The Court made these findings despite the fact that the jury, in the guilt phase, acquitted petitioner of committing a lewd act and oral copulation in violation of Penal Code 288(d).

Evidence was presented on the sexual offenses charged including evidence by jail inmates that petitioner admitted this murder in the course of committing sexual offenses. The prosecution also argued these offenses to the jury in its closing argument at the guilt phase (Tr. 3876-3877).

The jury's acquittal on these charges and their special circumstances findings necessarily resolved this issue in petitioner's favor.

Once these factual issues are resolved in petitioner's favor, the prosecution is precluded from arguing such factual issues to support any other finding or verdict. Petitioner could not be retried for these offenses and the facts could not be used to support aggravating circumstances. Ashe v. Swensen, 397 U.S. 436 (1970); Delap v. Dugger 890 F.2d 285 (11th Cir. 1989), Cert.den. 110 S.Ct. 262 (1990); People v. White 185 Cal.App.3d 824 (1986); People v. Asbury 173 Cal.App.3d 362 (1985).

Collateral estoppel is an integral part of the double jeopardy clause. The same principle prevents an appellate court reviewing the judgment from using facts and issues resolved in petitioner's favor to support another verdict. Arizona v. Rumsey 467 U.S. 203 (1984) [even erroneous finding constitutes an acquittal]; Bullington v. Missouri 451 U.S. 430 (1981).

In order to invoke successfully the principle of collateral estoppel, a party must show:

(1) That the issue in question was actually raised and litigated in the prior proceeding;

(2) That the determination was a critical and necessary part of the final judgment; and

(3) That the issue in the later proceeding is the same as that involved in the prior action.

Ashe v. Swensen, supra, 397 U.S. 436 443; Delap v. Dugger, supra, 890 F2d at 314; De La Rosa v. Lynaugh, 817 F.2d 259 5th Cir. 1987).

Application of these principles to petitioner's situation demonstrates that the California Supreme Court violated the principle of collateral estoppel.

(1) Was the issue raised and litigated?

The issue of whether petitioner sexually assaulted Michele Melander was raised and litigated at his trial. Defendant was charged with committing a lewd act or oral copulation under California Penal Code 288 and 288(a). He was acquitted of these offenses by the jury. The jury also found "not true" special circumstances allegations that the murder was committed in the commission of a lewd act on a child under 14 years of age and that the murder was committed in the course of an oral copulation under California Penal Code Sec. 288(a). This acquittal included any attempt to commit such offenses.

2. Was the determination a critical and necessary part of the judgment?

The determination that petitioner did not have sexual intercourse (vaginally or orally) with the victim was a critical and necessary part of the final judgment. The courts have held that in order to determine if collateral estoppel applies it is necessary to examine the pleadings, evidence, jury charge and other relevant material in the record of the first trial. Ashe v. Swensen, supra, 397 U.S. at 444; Delap v. Dugger, supra, 890 F.2d at 314-315. An examination of these materials establishes that petitioner was indited for these offenses, evidence was presented, argument was made to the jury by the prosecutor and defense and the jury was so instructed (See, e.g., Tr.3876-3877).

3. The issue on appeal is the same as in the first trial.

The California Supreme Court is precluded from using any issue against petitioner that was actually resolved in his favor. The issues of whether petitioner had sex (vaginal or oral) with the victim were resolved in his favor by the jury at the trial. The appellate court "finding" that "[t]here was evidence that at some point he also sexually abused the body" (People v. Pensinger, supra, 52

Cal.3d at 1237) is an attempt to resurrect an issue resolved in petitioner's favor. The fact that it is being used to sustain an appellate finding of premeditated murder does not alter the fact that principles of collateral estoppel prevent this use of rejected evidence. Similarly, the "finding" that petitioner killed the child in order to have sex with her was rejected by the jury. Its use on appeal to support evidence of motive violates the principle of collateral estoppel.

The unique procedural posture of this case - where it is the appellate court that violates the double jeopardy provision - does not alter the requirement that the state may not relitigate issues resolved in petitioner's favor. The double jeopardy clause bars post acquittal fact-finding proceedings. U.S. v. Martin Linen Supply Co. 430 U.S. 566 (1977).

In Smalis vs. Pennsylvania 476 U.S. 1040 (1986), this court held that the double jeopardy clause barred a state from appealing from a trial court ruling on a demurrer which determined that the evidence was insufficient to establish factual guilt. The Court rejected the argument that an appeal was simply continuing jeopardy and held in language apposite here that, unlike convictions, acquittals terminate

the initial jeopardy.

Thus, whether the trial is to a jury or to the bench, subjecting the defendant to post acquittal fact finding proceedings going to guilt or innocence violates the double jeopardy clause. Arizona v. Rumsey 467 U.S. 203 (1984), 211-212.

The California Supreme Court's attempt to use evidence that petitioner either had or wanted to have sex with the victim subjected him to "post acquittal fact finding proceedings" in violation of the double jeopardy clause.

It has long been the rule that a verdict of acquittal could not be reviewed on appeal even where the trial judge's direction of a not guilty verdict was based on egregious error. Fong Foo v. U.S. 369 U.S. 141 (1962). More recently, in United States v. Martin Linen Supply Co. 430 U.S. 564 (1977), this court barred the government from appealing a trial court's entry of a Rule 29(c) acquittal after a deadlocked jury was dismissed. The court found that the trial judge's decision constituted factual findings in favor of the defendant barring an appeal.

Finally, this court's decision in Arizona v. Rumsey, supra, 467 U.S. 203, bars use of petitioner's acquittal on appeal. In Rumsey, a trial judge sitting as a sentencer in a

death penalty proceeding entered a life sentence based on a erroneous construction of the law governing a particular aggravating circumstance. This court held that the double jeopardy clause barred a second sentencing hearing. (Id. at 211-212.)

The collateral estoppel rule is an integral part of the double jeopardy clause barring a relitigation of facts. The prohibition on relitigation of facts extends to appellate courts and bars an appeal. The California Supreme Court, in sustaining the murder charge, erroneously relitigated facts found in petitioner's favor by the jury.

IV.

THE DUE PROCESS CLAUSE AND THE EIGHTH AMENDMENT ALSO BAR THE CALIFORNIA SUPREME COURT'S USE OF FACTS RESOLVED IN PETITIONER'S FAVOR.

We reincorporate the argument made in part III, supra, see Delap v. Dugger, supra, 890 F.2d 285, and remind the Court that its own Eighth Amendment jurisprudence requires a more careful and heightened reliability analysis. See Zant v. Stephens, supra, 462 U.S. 862.

V.

THE USE OF PERJURED TESTIMONY BY AN INFORMER AND THE FAILURE TO DISCLOSE PERJURY CONSTITUTE DUE PROCESS VIOLATIONS ENTITLING PETITIONER TO A NEW TRIAL

The California Supreme Court found that the use of perjured testimony and the prosecution's failure to disclose that inmate Gary Howard had perjured himself should have been corrected. People v. Pensinger, supra, 52 Cal.3d at 1273. However, the Court found the errors harmless because Howard's attempt to obtain prosecution aid was unsuccessful and Howard did testify "without securing a quid pro quo, and because the portion of his testimony was not demonstrably false or misleading. His denial that he requested any help from the prosecution, while false did not mask any inducement." (Ibid.) The court also characterized Howard's desire to get a life sentence in his "own penalty trial" as the strongest evidence of Howard's initial motivation for cooperation. (Ibid.) Finally, the court pointed out that Howard was impeached generally, that others testified as to his motivation to obtain a bargain in his own case and that the prosecution conceded in closing that Howard was a liar. (Ibid.)

The Court's reasoning is seriously flawed both

factually and legally. Had the People lived up to their constitutionally imposed discovery request, Howard's testimony would have been "demonstrably false". Factually the Court is in error because when Howard testified at petitioner's trial he had already been sentenced to death. Howard's trial ended in February 1982 and petitioner's trial began in June 1982. Howard was demanding additional consideration because the earlier assistance he had received in the form of favorable prosecutor testimony at his penalty phase had been exhausted. Since he was facing the death penalty he wanted to secure his daughter's future. This fact, had it been revealed to the defense, would have opened a powerful line of questioning about the way in which Howard kept trying to change the deal that the had with the State. Additionally, the Court does not cite to the context in which the prosecutor said that Howard lied. Again the California Supreme Court has confused the time sequence. The prosecution, at the evidentiary hearing, conceded that Howard had lied. (H.T. Vol.8 pp 618-619).[2] No such concession was made at trial. However, we know and can cite to the precise lines in which the prosecutor told the jury

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[2] H.T. refers to the June 1988 Hearing transcripts

that Howard was courageous in testifying, that he sought nothing in return for his testimony and that his motives were "fathomless" (Tr. 3848).

Legally the Court is in error because it is irrelevant that an informer does not get what he asks for from the prosecution. The fact that such a key witness lied to the jury and that the prosecutor knew it and did nothing to correct it is a per se due process violation. In addition, the California Supreme Court attempted to restructure the question of relevance to be whether or not the informer actually received something from the State. What is relevant is the informer's state of mind, his attempt to condition his testimony in exchange for favorable treatment. This evidence bears on his reliability just as much as evidence that he actually realized the deal he sought. The good faith or bad faith of the prosecution is likewise irrelevant. Brady v. Maryland 373 U.S. 85 (1963). In Giglio v. United States 405 U.S. 150 (1972), the Court held that "when the reliability of a given witness may well be determinative of guilt or innocence nondisclosure of evidence affecting credibility falls within the general rule" of Brady. (Id. at 766.)

VI.

THE CALIFORNIA SUPREME COURT APPLIED AN IMPROPER TEST TO DETERMINE THE HARMLESSNESS OF THE PROSECUTOR'S USE OF AND FAILURE TO DISCLOSE PERJURY

In deciding that the use of perjury and failure to disclose were harmless the California Court never found that the error was harmless beyond a reasonable doubt as is required by this Court's decision in Chapman v. California 387 U.S. 18 (1967). The Court merely concluded that the errors were harmless because Howard had been impeached generally and because he did not receive the inducement that he sought. People v. Pensinger, supra, 52 Cal.3d at 1273. This reasoning is not a substitution for applying a proper analysis and standard.

A new trial is required if the false testimony could "in any reasonable likelihood have affected the judgment of the jury..." United States v. Bagley 473 U.S. 667 (1985); Giglio v. United States, supra, 405 U.S. at 153-154.

Howard was a critical witness at trial since the only other witness to the kidnapping was a five year old boy who cold not identify the petitioner. The prosecutor referred to Howard in twenty-one of eighty pages of his closing argument. Howard was the conduit for the petitioner's

admission of the crime. The prosecution also used Howard's testimony to corroborate the testimony of other key witnesses, including two other informers, thereby engaging in a mutual bolstering strategy. Had petitioner been able to discredit Howard, then and there, the most powerful source for petitioner's admission would have been reduced or eliminated. Bagley v. Lumpkin 798 F.2d 1297, 1302 (9th Cir. 1986). Howard's testimony was demonstrably false but only the prosecutor knew it. Moreover, a persuasive corroborative tool would have also been effectively eliminated or reduced.

It is clear that the California Supreme Court did not apply the proper test when it found that the prosecutor used and failed to disclose that his key witness had lied on a very critical point viz. the requests which he had made to the prosecution. It is necessary to grant the writ to correct that serious fact-finding error which reduced the reliability of the decision in a capital case where the Eighth Amendment requires enhanced reliability. Zant v. Stephens, supra, 462 U.S. 874. Finally, this Court should not lend its imprimatur to the People's callous use of a sporting theory of justice.

VII.

BRADY v. MARYLAND AND ITS PROGENY REQUIRE A REVERSAL OF PETITIONER'S CONVICTION BECAUSE THE PROSECUTION FAILED TO DISCLOSE CRITICAL EVIDENCE AFFECTING THE CREDIBILITY OF THE MOTHER OF THE VICTIM.

In Brady v. Maryland 373 U.S. 85 (1963), the Supreme Court held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 86-87. The Court explained that this Rule was not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.(Ibid.)

This Rule was further refined in Giglio v. United States, supra, 405 U.S. 150, where the Court held that the suppression of evidence relating to the credibility of a prosecution witness (an agreement not to prosecute a co-conspirator) similarly required the reversal of a conviction. Chief Justice Burger held that, "when the 'reliability of a given witness may well be determinative of guilt or innocence', nondisclosure of evidence affecting credibility falls within this general rule." (Id. at 766, quoting from Napue v. Illinois, 360 U.S. 264, 269 (1959).

The police report at issue here was critical to

petitioner's guilt or innocence. It established that Mrs. Melander did not want her baby, that her husband would not approve of adoption for the child - evidence of Mrs. Melander's attitude towards her child. This is also evidence of motive to dispose of her child. All of this evidence is relevant and admissible under California law. Cal. Evid. Code section 780(f).

Similarly, the evidence that Mrs. Melander struck her other child and was the subject of an investigation for child abuse demonstrates a pattern of child abuse and a motive to fabricate an explanation of her conduct in this case. Davis v. Alaska 415 U.S. 308 (1974).

This testimony would also be admissible to impeach her credibility about her concern for both children (Tr. 2331-33). Mrs. Melander cried at the end of her direct examination and when confronted about her feelings on cross-examination (Tr. 2241-2242). She also denied that she and her husband quarreled when she brought her children to a bar the night Michele was kidnapped (Tr. 2313-2314).

Thus, this police report is material and crucial because it would have (1) helped to establish petitioner's defense that Mrs. Melander was responsible for Michele's death, and (2) it would show that Mrs. Melander, because of

motive and her prior history, was not a truthful witness. Either ground, the establishment of a defense Brady v. Maryland, supra, 373 U.S. at 88-89 or credibility of prosecution witnesses United States v. Bagley, supra, 473 U.S. 667; Giglio v. United States, supra, 405 U.S. 150 establishes materiality.

A. Prosecution Disclosure Would Have Established That A Crucial Witness, Mrs. Melander, Testified Falsely.

Mrs. Melander's testimony conveyed the idea that she loved her children, that she was as concerned about the absence of her second child as much as the absence of her son (Tr. 2331-2333) and that she was grieving after the child's death (Tr. 2241-2242). The revelation of the withheld evidence would have established that Mrs. Melander was not truthful, that she testified falsely and that her aura of concern was false.

The presentation of false testimony to a jury is incompatible with "rudimentary demands of justice!" Mooney v. Holohan 294 U.S. 103, 112 (1935).

In Pyle v. Kansas 317 U.S. 213 (1942) and Napue v. Illinois, supra, 360 U.S. 264, the Court reaffirmed this principle and held that "[t]he same result obtains when the State, although not soliciting false evidence, allows it to

go uncorrected when it appears." (Id. at 269) (See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function, section 3-5, 6.)

In United States v. Bagley, supra, 473 U.S. 677, the Court made it clear that constitutional error occurs in the "Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination."

Certainly the South Carolina police and investigative reports would have made cross-examination more blunt and forceful on the issue of motive, her concern for her children and her attitude towards Michele Melander, the murder victim.

The suppression of this evidence was aggravated by the people's objection at the evidentiary hearing; in effect compounding the initial constitutional error and using the prior failure to disclose as a basis for objection. Thus, the people's interference with petitioner's constitutional rights continues to deprive him of a full and fair attempt to vindicate his right to a fair trial and his right to confront witnesses. Such official procedural interference was condemned in Amadeo v. Zant 486 U.S. 214 (1988).

B. The Prosecution's Argument That Mrs. Melander Was Incapable of Violence Towards The Victim Was An Exploitation Of The False Evidence In Its Possession.

The prosecution argued in rebuttal of the defense argument that Mrs. Melander neither killed nor caused the death of her child and that she was, like a normal mother, not capable of such violence to her child.

The prosecution further argued that Mrs. Melander had no motive, could not afford to pay someone to kill her child and "what mother would do that to her kid, period?" (Tr. 3842).

It is clearly excellent advocacy to make these arguments but it is the height of prosecutorial misconduct to make the argument while withholding the material with which petitioner could have blunted claims of maternal concern.

The verdict and sentence of death are not accurate and reliable factual determinations and thereby undermine confidence in the outcome.

Giglio's holding makes it clear that the only issue is the failure to disclose, not good faith or negligence. (Id. at 153-154.)

This Court can conclude from the record before it that

(1) there was a request for disclosure, (2) the People failed to disclose, and (3) that the evidence withheld was material.

In United States v. Bagley, supra, 473 U.S. 677, this Court held that a constitutional error requiring reversal occurs only if the evidence is material "in the sense that its suppression undermines confidence in the outcome of the trial." (Id. at 678; see also, United States v. Agurs 427 U.S. 97, 112 (1964). "If disclosed and used effectively, the evidence may make the difference between conviction and acquittal". (Id. at 678.)

If we apply the Bagley standard to the case at bar, we can hardly have confidence in the outcome of the trial. Mrs. Melander's preposterous story that petitioner drove away from a police station with her children, let one go and murdered the other would have been subject to much more critical scrutiny if the jury knew she had earlier struck one of them with a pliers, been investigated for child abuse, did not want to be pregnant with her second child, and, wanted to put that child up for adoption after birth but her husband would not allow it.

In Giglio, supra, 405 U.S. 150 the Court reversed a forgery conviction because a sentencing deal was not

disclosed. In Bagley, supra, 798 F2d 1297 it remanded because the government failed to disclose that two witnesses in a federal narcotics and firearms indictment were expecting payment for their information. On remand, the Ninth Circuit held that the Brady violation did indeed undermine confidence in the outcome of Bagley's trial and it reversed. (Id. at 1302.) The Ninth Circuit noted that it was inconceivable that evidence of perjury would not, as an objective mater, affect a fact finder's assessment of a witness's credibility. (Id. at 1301.) The Court also noted that lies to conceal bias and prejudice "raise the impeachment evidence to such a level that it is difficult to imagine anything of greater magnitude that wold undermine confidence in the outcome of a trial." (Ibid.)

Certainly, the Eighth Amendment requirement of accurate fact finding in a capital conviction mandates reversal. Zant v. Stephens, supra, 462 U.S. at 874.

Given the totality of information discovered about the credibility of Mrs. Melander, it is obvious that we can not rely upon the jury's verdict in this case. As in Bagley, her testimony was central to the prosecution's case. It related to both credibility and bias. A successful effort to prove bias on the part of a witness has been held to have

a tendency "to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony." United States v. Abel 469 U.S. 45 (1984), 50. Davis v. Alaska 415 U.S.308 (1974).

CONCLUSION

This Court should grant the writ on any and all of the grounds complained of herein. This case constitutes a shocking array of constitutional violations that render the underlying conviction and the death penalty suspect.

Dated: 8-13-91

RESPECTFULLY SUBMITTED.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRETT PATRICK PENSINGER, Defendant and Appellant.	S004466 Crim. 22808 (Super. Ct. No. 38261)
In re BRETT PATRICK PENSINGER on Habeas Corpus.	S009489 Crim. 24569

MODIFICATION OF OPINION

THE COURT:

The opinion herein, appearing at 52 Cal.3d 1210, is modified as follows:

On page 1247, the fifth sentence in the first full paragraph is omitted.

On page 1250, after the word "involved" on the third line from the top of the page, the following language is added: "in securing Howard's statements."

On page 1271, in the first line of the first full paragraph, the word "last" is deleted and the word "next" is substituted.

On page 1271, before the hearing "VI. HABEAS CORPUS," the following language is added.

"M. Effect of Invalid Special Circumstance.

Defendant contends that the reversal of the torture-murder special circumstance finding requires reversal of the penalty judgment despite our affirmance of the kidnap-murder special circumstance finding. We disagree. As we have said before: "The United States Supreme Court has upheld a death penalty judgment despite invalidation of one of several aggravating factors [citation], and this court is in accord." (People v. Sanders (1990) 51 Cal.3d 471, 520.) Although instructional error requires reversal of the torture-murder special circumstance finding, the evidence of the shocking nature of the attack on the infant victim was properly before the jury. The erroneous special circumstance finding was only a "statutory label" which could not have affected the verdict in light of the evidence properly before the jury. (See People v. Wade (1988) 44 Cal.3d 975, 998.)"

This modification does not affect the judgment.

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRETT PATRICK PENSINGER, Defendant and Appellant.	S004466 [Crim. 22808] (Super. Ct. No. 38261)
In re BRETT PATRICK PENSINGER on Habeas Corpus.	S009489 [Crim. 24569]

Defendant Brett Patrick Pensinger was convicted of the first degree murder of Michelle Melander, and the jury found true special circumstance allegations that the murder was committed in the course of a kidnapping and that the murder was intentional and involved the infliction of torture. The jury found not true allegations that the murder was committed during the commission of a lewd act on a child under the age of 14 and that the murder was committed in the course of an oral copulation in violation of Penal Code section 288a. Defendant was also convicted of kidnapping Michelle Melander and Michael Melander, Jr. He was acquitted of committing a lewd act, or oral copulation in violation of Penal Code section 288a, on

SEE CONCURRING OPINION

Michelle Melander. The jury fixed the penalty at death, and this appeal is automatic.

We affirm defendant's convictions and affirm the special circumstance finding as to the allegation of a murder in the course of a kidnapping. We reverse the torture-murder special-circumstance finding, but affirm the penalty determination.

I. SUMMARY OF FACTS

On July 31, 1981, defendant left his Orange County, California home and went on an errand in his uncle Thomas Meyer's pickup truck from which he never returned. On August 4, 1981, defendant turned up in Parker, Arizona. He went to the Silver Saddle bar in midafternoon, and met Vickie and Michael Melander, who had been there drinking since noon. Defendant introduced himself as Panama Red, and said his real name was Don Donovan. He drank and played pool with the Melanders. At about 7 p.m., Vickie said she had to go check on her children who were staying with a friend. Defendant drove her to the Williams home, and Vickie introduced defendant as Panama. Defendant and Vickie put Michael, Jr., five, and Michelle, five months, into the truck with them and drove off, around 7:40 p.m. They drove about 10 minutes, then stopped at the Turtle Barn bar in Parker. Vickie and defendant went in for a beer, leaving the children unattended in the truck. While they were inside, Michael, Jr., found defendant's rifle and pointed it at a man in the Turtle Barn parking lot, who confiscated it. When Vickie came out to check on the children, Michael, Jr., told her that a man had stolen Panama's gun. She

told defendant, and she said he became enraged, so much so that she became afraid of him and ran off down the street. Vickie said that defendant drove after her and persuaded her to get back in the truck. They went to the Silver Saddle, where Vickie again left the children unattended in the truck, and reported to her husband that defendant and she were going to the sheriff's substation to report the theft of the gun. Defendant apparently had a beer while the Melanders talked. Some witnesses said the Melanders argued; none reported that defendant acted violent or angry.

Vickie and defendant, still with the children in the truck, arrived at the sheriff's substation about 8:20 p.m. Vickie went into the station, expecting defendant to follow. She reported the theft; the sheriffs said it was a local police matter, and called the Parker police for her. She looked out and noticed that the truck was gone, but was not concerned, assuming that defendant was either looking for his gun or was back at the Silver Saddle. When the local police arrived, she reported that her own gun had been stolen; then, when she was unable to describe the weapon, she admitted that it was actually someone else's gun. The police drove her back to the Silver Saddle about 9 o'clock. When she realized that her children were still unaccounted for, she became concerned.

A customer and an employee of the PDQ market in Parker testified that a tall young man in a cowboy hat came into the

store sometime after 8 o'clock on August 4, looking for someone who had stolen a rifle out of his truck when his wife and five-year-old child were in it. He was beside himself with rage, and said that if the person who stole the gun came in and tried to use it in a robbery of the store, they had his permission to grab the gun and "blow their head off." The store employee saw the man get into a light blue pickup and drive off. The employee saw no one else in the truck.

Michael, Jr., confirmed that the man he knew as Panama came with his mother to pick him and his sister up at the Williams house, that they all drove off in the man's light blue pickup, that they stopped at the Turtle Barn, that his mother and Panama went in, that he pointed Panama's rifle at a man in the parking lot, that the man took the gun, that when his mother told Panama this, Panama "hit the wall" and his mother ran off, that Panama got his mother to get back in the truck, and that they went to the sheriff's substation where his mother went in. Michael, Jr., said that Panama drove off, and when they got near the Parker Dam, Panama said that there was a cop following him and that Michael, Jr., should get out and wait until Panama came back for him. The boy did. After a while he started to hitchhike. He did not recall stopping at the PDQ market, and he did not see Panama hit his sister in the truck. He misidentified a photo of another man as Panama, was unable to identify defendant, but did identify a picture of

defendant's his truck. He said Panama did not hit him, and that Michelle was crying as Panama drove off. He was certain that it was the same man who picked him up at the Williams home, who drove off with him and his sister and left him by Parker Dam.

A couple picked Michael, Jr., up about 9:30 p.m. near the Parker Dam, on the California side of the dam. He did not seem upset, but said that a man whose name he did not know had his little sister and had driven off with her in his pickup. They called the sheriff, and waited in a restaurant. When the sheriff came in, the couple said the boy's first words were, "Where's Panama?" Michael, Jr., told the sheriff that Panama had taken him and Michelle from in front of the substation, that Panama had taken him to his trailer and that Panama then had dropped him off on the road, telling him to wait.

Michelle's body was discover[illegible] days later on August 10, 1981, in the Black Meadows L[illegible]ding dump in California, some nine miles from where Michael, Jr., was found. The body had many injuries, including a crushing injury to the skull which definitely occurred before death. Depending on the type of brain injury suffered, the child could have lived from two to twenty minutes, but no more.

There was also a bruise above and to the left of the left eye, caused by pressure from a smooth surface, which occurred while there was good circulation of blood. The collarbone was fractured in two places, and three front left

ribs were broken and pressed in so that they seriously jeopardized breathing and probably punctured the lungs. A single crushing blow probably caused these injuries, and they happened when the child was alive and had good circulation, before she went into shock. The pathologist had no basis for determining whether the head or the rib injuries came first. Associated with the rib injury was a bruise involving scraping and tearing of the skin from the left nipple to the left armpit; this also occurred before death.

The left upper arm was fractured near the elbow and nearby there was a bruise. These injuries could have been caused by impact from a blunt object, or by holding the child by the arm and twisting the arm while flinging the body down. They happened before death and before the child went into shock. In addition, there were many small, irregular scrapes, bruises and tearing of the skin along the left outer forearm, inflicted while there was good circulation and blood pressure, before shock. There was also a large bruise on the left thigh which occurred before death.

These were the injuries which occurred before death. There was considerable further injury which may or may not have occurred after death. Seven right back ribs and six back left ribs were broken and pressed in. This injury happened at one blow. There was a long incision from the ribs to the groin on a slightly leftward diagonal. It appeared that the uterus had

been removed through this opening. There were two small incisions over the left groin. There was an oval incision between the legs; the vagina and anus had been removed. It was impossible to determine conclusively whether there had been any sexual assault.

Defendant was arrested in Midland, Texas, in mid-August. He had his uncle's truck; it was dirty, dented, and stripped of valuables. In it were a box of blades for a utility knife and a crumpled cowboy hat. There was blood on the front fender, but it could not be determined whether this was human or animal blood. The fabric and seat covers in the truck were examined, and there was no sign of blood or hair on them. Defendant had bloodstains on his pants, shirt, belt and boots when arrested, but they were not typed or compared to his or the victim's blood.

Defendant was extradited from Texas to Oregon, where he was housed in a Washington County jail with one Tony Krossman, who had been a paid informant for the Federal Bureau of Investigation, the Drug Enforcement Administration, and various sheriffs' departments. Krossman was under sentence for grand theft, with a five-year probation on conditions that he serve a year in jail and that he not act as an informant without the knowledge of the sentencing judge. Krossman testified that defendant told him that he was trying to make bail because he was afraid that warrants would arrive from Arizona and California charging him with kidnapping and

murder. Krossman said that defendant told him he had killed someone. The only details Krossman could remember were that defendant said that the crime had happened in Parker or Flagstaff, Arizona, and that the defendant was afraid that a blonde woman had seen him in the course of the crime. When detectives from San Bernardino County interviewed Krossman in the Oregon jail, he initially denied that defendant had said anything to him. He later explained to Oregon officials that his probation condition prevented his cooperation; when the Oregon officials cleared his cooperation with his sentencing judge, he gave the incriminating statements. Krossman had been released from jail at the time of his testimony, and he had received and expected no benefits for it.

Two San Bernardino jailhouse informants gave much more detailed statements.

Gary Howard[1/] was in an isolation unit in a cell adjoining defendant's in September 1981. He said that he had no access to television, radio or newspapers in the unit, and had heard nothing about defendant's case. Defendant, in their first conversation, told Howard that he was charged with a kidnap murder involving a child. A couple of days later, defendant said that he had trouble sleeping because of his case

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1/ See People v. Howard (1988) 44 Cal.3d 375.

and needed to talk. He said he had picked up a baby in Arizona and killed her. A few days later, defendant told Howard that he had been going through Arizona and stopped at a bar, where he drank and shot pool with the Melanders. He got friendly with Mrs. Melander, and when he told her he was on his way to Texas but was broke, she said that if he would drive her out to pick up her children, she would give him money for gas. They went and picked up the children, and then went into another bar. Little Michael, Jr., came in and said someone had stolen a gun out of the glove compartment of defendant's truck. Defendant got upset, and Mrs. Melander suggested going to the police. They went to a sheriff's substation, but defendant decided not to enter it because he remembered that the truck he was in was stolen. He drove off because he was fearful of being discovered with the stolen truck. He drove around not knowing what to do. He had been drinking and shooting Quaalude. He drove out of town, and when the little girl started crying, he slapped her hard enough to break her ribs, but she did not stop crying. He then threw her around in the truck, and she did stop crying. In one conversation he said that when he stopped to relieve himself, Michael ran off. In another conversation defendant said that Michael was still in the car when he stopped and tried to force the baby to orally copulate him. When he could not do this, he cut her belly and cut her private parts out. He then drove to a dump and put her

in a plastic bag and threw her out. He said he cut the baby with a hunting knife and left her body near Parker Dam. In another conversation defendant said that he had a companion named Paul who slapped the baby around in the truck, then threw her out at the dump and cut her. He later admitted that there had been no accomplice. Defendant also said that he was going to "play a dummy act" to get to Patton State Hospital, and claim he had a split personality and had blacked out. At one point during one of their conversations, defendant said that he kept slashing and sticking the baby, that she kept screaming and yelling, that she looked like hamburger and that he was cutting her with the knife to stop her from crying. In another conversation he said that he had removed the sex organs to obscure the sexual assault and to make it difficult to identify the baby's sex.

Howard denied that he got any of this information from the press or in the jail. He denied that he received any benefit for his testimony, though it is true that two of the investigating officers and the district attorney in this case testified for him at his penalty trial, which occurred before defendant's trial. He said that he was testifying because he had a little girl and did not like baby murderers. He admitted making a false accusation against someone in a drug offense in the hopes of getting help in his child custody dispute.

David Hicks, who was in custody pending sentencing on a robbery conviction, and who was still facing trial in a kidnap robbery, testified that in October 1981, defendant found that Hicks was housed with Howard, and told Hicks that he would give him $500 to kill Howard to prevent Howard's testimony against him. Hicks had no intention of killing Howard. In December, when they were housed together, defendant asked Hicks why he had not killed Howard. Hicks at first said he had no reason to do it, then said if defendant's father would give him $500, he would do it. Defendant then told him about the charged offenses. He said that he had stolen his uncle's truck and had gone to Oregon to see his girlfriend Molly. He found she had another boyfriend, so he slashed the tires and broke the windows on the boyfriend's car and went to Parker, Arizona. He said he was drinking with the Melanders, and that Vickie said that she would give him gas money if he gave her a ride to pick up her children. They picked up the children and stopped at a bar. The boy, Michael, came into the bar and said that a gun had been stolen from the truck. Defendant suspected Michael Melander, Sr. They went to the police station to report the theft, and Vickie went into the station. Defendant drove off because he was frightened about being in the stolen truck and feared he had warrants outstanding from Oregon. He stopped in the desert to urinate and the boy ran off. He drove to a junkyard. He "did in" the baby girl. He tried to have

sex with her but she was too small so he cut her. He put her in a plastic bag and threw her body in the junkyard. He went to the dam and buried the knife. He said he had not thrown the knife into the dam, as he had told Howard. Hicks told defendant he should have his father go and recover the knife, but defendant said that this was not possible because he had told his father he was innocent. Hicks offered to have the job done, and defendant told him where he had hidden the knife.

Hicks denied getting any benefits for his testimony and denied that he had gotten any of the details of the offense from Howard or anywhere but from defendant. He admitted putting on a false insanity defense at his trial. He did not tell the authorities about defendant's statements until just before his own sentencing, in January 1982. He was testifying out of a sense of public duty. He told officers about the location defendant said he had put the knife; the officers did recover the utility knife handle from that location.

The investigating officers in the case confirmed that they had offered Howard and Hicks no benefits for their testimony. They also confirmed that the isolation units in which defendant, Hicks and Howard were housed generally had no access to radio, television or newspapers, but confirmed that Howard could have had access to newspapers during a period in August 1981.

The defense case consisted of attacks on the credibility of Howard, and defendant's testimony that he had not kidnapped the children nor harmed the child. Police officers and relatives of Howard testified that he had a reputation as a liar and a cheat, and that it was always difficult to sort out what was true from what was false about his statements. Investigators in Howard's own capital case said he had made false accusations against another person with great dramatic flair. Both Howard's estranged wife and a nephew of Howard said that Howard told them that one of the investigating officers had either shown him the body or a photograph of the body of the victim, and he said that it looked like hamburger. Howard also told both that he was cooperating with the police in the hopes of a bargain on his own case. Howard's ex-wife said that he had falsely informed police that she had a large quantity of cocaine for sale.2/

Another witness said that about a week before the kidnapping, she heard Vickie Melander talk about borrowing money from a "Panama." Vickie's mother-in-law testified that Vickie did not appear to love her baby girl. The defense also

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2/ Howard later recanted his trial testimony and said defendant had never made any admissions to him, but had always maintained his innocence. This issue is before us in the petition for writ of habeas corpus, discussed post.

elicited from prosecution witnesses that Vickie Melander was distraught over her cramped living situation on the day of the murder, was fed up with her unemployed husband, had discovered that she was pregnant again, and had asked an acquaintance whom she hardly knew if she could move in with her after she left her husband.

Defendant testified that on July 31, 1981, his uncle sent him to pick up a roll of carpet. He had an accident which dented the truck, and fearing his uncle's displeasure, he drove off to visit friends. He ended up in Parker, and spent the afternoon in the Silver Saddle bar, as the prosecution witnesses had testified. It was Vickie Melander who gave him the nickname of Panama Red. He denied ever using the name Don Donovan. He took Vickie Melander to pick up her children, and then they stopped at the Turtle Barn bar so Vickie could talk to a friend. Vickie told him that Michael, Jr., had said that someone had stolen defendant's rifle out of the truck. Defendant said he did not become enraged, and that Vickie had not run away from him toward the sheriff's substation. He said that they drove back to the Silver Saddle, and that he would not agree to go to the substation because he was driving a stolen truck. Defendant flirted with the bartender at the Silver Saddle while Vickie got into an argument with her husband. Vickie then asked defendant to drive her to another bar to talk to friends about finding a place to stay for the

night. He could not remember the name of the bar or its exact location. He dropped Vickie and her children off there and then went to PDQ market looking for his gun. He admitted having been upset and telling the store employee that if they had trouble with whoever took the gun, to blow their head off. He then went into a restaurant and talked to a deputy sheriff,[3/] who said defendant should report the loss to the police. He then drove off to Texas. He did not clean the pickup truck. He got blood on himself during his arrest in Texas. He did not harm the children and he was not familiar with the area around Parker Dam or with the town of Parker. He did not talk to Tony Krossman about anything except his girlfriend in Oregon, and he followed his attorney's advice and did not talk to anyone in the San Bernardino County jail about his case.

In rebuttal the prosecution put on evidence that there was no bar in Parker in the area where defendant said he had dropped off Vickie and her children.

II. GUILT PHASE ISSUES

A. Sufficiency of the Evidence.

The court instructed the jury on three theories of first degree murder liability: premeditated, deliberate

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3/ The court ruled that the deputy could not testify because he had been hypnotized and questioned about defendant. The jury was so instructed.

killing with malice aforethought; murder by means of torture; and killing in the course of a violation of Penal Code section 288, the commission of a lewd act on a child under 14. The jury acquitted defendant of the charge of committing a lewd act on a child, and so we can assume that the jury rejected the felony-murder theory. Defendant argues that there was insufficient evidence to support either of the two remaining theories of liability.

When it is alleged that there is insufficient evidence to support the verdict, a reviewing court must review the entire record to determine whether it contains substantial evidence from which a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. (People v. Johnson (1980) 26 Cal.3d 557, 578.) It is our duty to "view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (People v. Mosher (1969) 1 Cal.3d 379, 395; see also People v. Rich (1988) 45 Cal.3d 1036, 1081-1082.)

We conclude that there was sufficient evidence of premeditation to support a verdict on that theory. We have found three categories of evidence which are sufficient to sustain a finding of premeditated, deliberate murder: evidence of planning, motive or of an exacting manner of killing. (People v. Anderson (1968) 70 Cal.2d 15, 26-27; see also People

v. Bloom (1989) 48 Cal.3d 1194, 1209.) Evidence in only one of these categories most often is insufficient; we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing. (Anderson, supra, 70 Cal.2d at p. 27.)

Here, there was considerable evidence of planning. There was evidence that defendant introduced himself under an alias, that he drove off with two children, taking advantage of their mother's temporary absence, that he drove out of town for at least half an hour, that he dropped off the child who was old enough to be able to hinder him in any way or identify him and testify to his acts, that he then drove in the dark along unlighted dirt roads to an abandoned dump, the sign for which was invisible until a vehicle had already made the turn and that he then broke the infant's arm, dashed her head against the rocks and stepped on her. There was evidence that at some point he also sexually abused the body. It can be inferred from the location and poor markings for the dump that petitioner was familiar with it before he abducted the children and planned to use it for its isolation.

Cases indicate that the total vulnerability of the victim and the evidence of a previously selected remote spot for the killing do suggest planning. (Compare, e.g., People v. Hovey (1988) 44 Cal.3d 543, 556 [kidnap of young victim and transportation to secluded spot shows planning]; People v.

Frank (1985) 38 Cal.3d 711, 733 [kidnapping preselected victim, substantial distance to secluded location and methodical sadism show planning]; People v. Alcala (1984) 36 Cal.3d 604, 626-627 [kidnapping of victim to remote area, taking to very secluded spot and use of deadly weapon show planning].) This, combined with the evidence that defendant selected the more helpless of his victims and abandoned the one who might resist him in any way or testify as to his acts, provides substantial evidence of a planned killing, "the most important prong of the Anderson test." (People v. Alcala, supra, 36 Cal.3d at p. 627.)4/

There is also some evidence of motive. The district attorney argued that defendant was motivated by an incomprehensible need for revenge over the theft of his rifle. Respondent points to evidence of defendant's conduct before the killing which suggested that defendant killed the child in order to have sexual intercourse with her. Although either motivation was totally unreasonable, this is true of any senseless killing, but the incomprehensibility of the motive does not mean that the jury could not reasonably infer that the

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4/ We do not require that the planning relate only to the act of killing. In People v. Arcega (1982) 32 Cal.3d 504, 519, for example, we said that the unusual circumstance that defendant had his curtains drawn was evidence of planning under the Anderson test. (See also People v. Lucero (1988) 44 Cal.3d 1006, 1018-1019 [luring girls into house and tying wrists of one constituted substantial planning evidence under Anderson].)

defendant entertained and acted on it. (People v. Wright (1985) 39 Cal.3d 576, 593.)

As for the final Anderson category, the evidence of the manner of the killing, brutality alone cannot show premeditation; a brutal killing is as consistent with a killing in the heat of passion as with a premeditated killing. (People v. Anderson, supra, 70 Cal.2d at pp. 24-25; see also People v. Alcala, supra, 36 Cal.3d at p. 626.) However, it must be remembered that the victim was five months old, and so could not walk, nor presumably crawl. There can be no question of any struggle, and the fact that there is substantial evidence that defendant took the child from the truck, removed her from her infant carrier and took her in his arms to the place of her destruction, supports an inference that the killing was preconceived. We recognize that a cold and calculating decision to kill can be arrived at very quickly; we do not measure the necessary reflection solely by its duration. (People v. Hernandez (1988) 47 Cal.3d 315, 350; People v. Wright, supra, 39 Cal.3d at p. 593; People v. Robertson (1982) 33 Cal.3d 21, 49-50; People v. Thomas (1945) 25 Cal.2d 880, 900-901.)

We are satisfied that the jury could find beyond a reasonable doubt from substantial evidence that defendant committed a deliberate and premeditated murder.

We also conclude that there was sufficient evidence from which a reasonable jury could conclude that defendant killed with the intent to torture.

Torture murder is "murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain." (People v. Steger (1976) 16 Cal.3d 539, 546.) There is no requirement that the victim be aware of the pain; what is considered culpable enough to punish the crime as a first degree murder is the calculated intent to cause pain for "'the purpose of revenge, extortion, persuasion or for any other sadistic purpose.'" (People v. Wiley (1976) 18 Cal.3d 162, 168; see also People v. Bittaker (1989) 48 Cal.3d 1046, 1101; People v. Davenport (1985) 41 Cal.3d 247, 267.) However, there must be a causal relationship between the torturous act and death, as Penal Code section 189 defines the crime as murder "by means of" torture. (Davenport, supra, 41 Cal.3d at p. 268.)

While the circumstances surrounding the killing may be used to support the inference that the defendant had the requisite intent, we have cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an "explosion of violence," as with the intent to inflict cruel suffering. (People v. Davenport, supra, 41 Cal.3d at p. 268, People v. Steger, supra, 16 Cal.3d at p. 546.)

Defendant maintains that this case falls into the "explosion of violence" category, and that since there was no evidence that the mutilation occurred before death, even the condition of the body did not support an inference of intent to cause cruel suffering. The People, on the other hand, point to the statements of Hicks and Howard to support the inference that at least some of the cutting occurred before the head and rib injuries.

Howard's statement supports the People's position. He said that defendant told him that while driving the truck, he had hit the baby or slapped her around the truck hard enough to break her ribs to stop her from crying, but that she had not stopped crying. He said he tried to orally copulate her, then cut her with his knife, then drove to the dump and threw her out. Howard reported that in one conversation, defendant said that he kept cutting the baby to stop her from crying. This evidence was not inconsistent with the pathologist's evidence. He said that the rib injuries which would have impaired lung function would not cause death immediately, and that there was nothing to indicate that the rib injuries occurred after the head injury. There was evidence from which a reasonable jury could conclude that defendant had battered and cut the child, while aware of her pain since she was crying, and had then driven to the dump, dashed her headfirst against a rock and stepped on her back. The head injury, which was of a kind that would be caused by impact against a rough surface such as a

rock, definitely occurred before death, so the jury could infer that the earlier injuries also came before death. Though the lack of evidence of blood in the truck made it doubtful that much bloodletting had occurred in it, no expert testified that it was impossible or even improbable that there had been some. We think that the evidence was sufficient to allow a jury to conclude that defendant had made incisions on the child while she screamed and that he was aware of her pain but continued to inflict it intentionally over a considerable period. The jury could infer a sadistic intent to give pain to punish her for crying. The evidence gave further ample support for an inference of a sadistic aspect to the infliction of the injuries, given the testimony regarding attempts to orally copulate or otherwise molest the child before death. Further, the incisions were carefully made with a sharp instrument, leaving no jagged edges, and showing no evidence of either hesitation or frantic slashing. There was a nearly scientific air to the incisions. This was strong evidence of a calculated intent to inflict pain rather than a wild explosion of violence.

Finally, even if a jury would necessarily have concluded that the incisions came after death, it could reasonably infer intent to cause cruel and prolonged suffering from the rest of the evidence showing a premeditated and brutal attack on a five-month-old infant. This is not a case like Steger, supra, 16 Cal.3d 539, where there was a history of a

child abuse syndrome which gave rise to periodic explosions of violence. The jury rejected a theory of voluntary manslaughter in the heat of passion; Michael, Jr., testified to no rage or cursing during the kidnapping. This, along with the long drive out of town to a very isolated spot, the abandonment of Michael, Jr., and the trip to the obscurely located dump, all show a calculation and lack of emotional upheaval that distinguishes this case from those in which we have seen only an explosion of violence rather than an intent to torture.

B. Diminished Capacity Instruction.

The court instructed the jury that it should consider the defendant's state of intoxication in determining whether specific intent to kill, malice, specific intent to kidnap a child for an illegal purpose and specific intent to commit a lewd act had been proven. (See CALJIC No. 4.21.) Defendant argues that the court's failure to instruct on diminished capacity (CALJIC Nos. 8.77 and 8.79) sua sponte was reversible error. He argues that as the charged crime was committed in 1981, before the effective date of legislation abolishing the diminished capacity defense,5/ that the court's retroactive

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5/ See Statutes 1981, chapter 404, sections 2 and 4, pages 1591-1592, 1594. As the bill had no urgency clause, it became effective January 1, 1982. (See People v. Ventura (1985) 174 Cal.App.3d 784, 789.)

application of the abolition of the diminished capacity defense to his case was a violation of the prohibition against ex post facto laws.

The record makes it clear that the trial court thought that the abolition of the diminished capacity defense applied to this case. The court should have realized that since the crimes alleged occurred before the effective date of the statute, the defense of diminished capacity was still available. Nonetheless it did not err in failing to instruct on that defense. The trial court must so instruct only when there is substantial evidence from which a reasonable jury could conclude that there was diminished capacity that negated the requisite criminal intent. (People v. Harris (1981) 28 Cal.3d 935, 957.) Normally, merely showing that the defendant had consumed alcohol or used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on diminished capacity. (People v. Carr (1972) 8 Cal.3d 287, 294-295; see also People v. Ramirez (1990) 50 Cal.3d 1158, 1181; People v. Turner (1984) 37 Cal.3d 302, 326; People v. Harris, supra, 28 Cal.3d at p. 958, fn. 8.)

The evidence here was that between 3 or 4 in the afternoon and 8:30 that night, defendant had several beers and a couple of shots of hard liquor. All the witnesses declared that defendant did not seem intoxicated. The only other evidence of intoxication was that Howard testified that

defendant told him that when he drove out of Parker with the children, he had been drinking and shooting Quaalude. Howard remembered seeing needle tracks on defendant's arm, but this recollection was impeached by defendant's demonstration that he had no tracks. Defendant testified and did not claim that he had been drunk.

This evidence does not amount to substantial evidence that defendant lacked the capacity to form the requisite mental states, when we compare this case with others in which we have dismissed evidence of diminished capacity as insubstantial. (Compare People v. Ramirez, supra, 50 Cal.3d at p. 1181; People v. Rodriguez (1986) 42 Cal.3d 730, 762-763; People v. Turner, supra, 37 Cal.3d 302, 326-327; People v. Harris, supra, 28 Cal.3d 935, 958-959; People v. Flannel (1979) 25 Cal.3d 668, 685-686; People v. Frierson (1979) 25 Cal.3d 142, 155-156.) In this case, there was evidence of relatively moderate alcohol consumption, and no evidence from independent witnesses or from defendant's trial testimony that defendant had been intoxicated. Though Howard testified that defendant said he had been drinking and injecting Quaalude, that he did not know what he was doing and that he blacked out during the killing, this was inconsistent with defendant's testimony at trial. Further, there was no expert testimony on the effect of

Quaalude. The evidence of diminished capacity was not substantial enough to require instruction.5/

Defendant argues that the existence of substantial evidence warranting the giving of the instruction is not an issue, because the court's decision to instruct pursuant to CALJIC No. 4.21, on the use of intoxication to show defendant did not actually have the requisite intent, conclusively establishes that there was sufficient evidence to require the giving of the diminished capacity instruction. We specifically rejected this argument in People v. Frierson, supra, 25 Cal.3d at page 157, saying that the People are entitled to an appellate determination whether the evidence of diminished capacity warranted the jury's consideration.

C. Intoxication Instructions.

The court instructed the jury that specific intent to kill and malice were necessary elements of murder and that "[i]f the evidence shows that the defendant was intoxicated at the time of the alleged offense, the jury should consider his state of intoxication in determining if the defendant had such a specific intent or mental state." The court told them that

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5/ Since there was no error, we necessarily reject defendant's claim that the failure to instruct on diminished capacity violated his federal constitutional right to due process of law.

if they had a reasonable doubt whether defendant had the requisite intent or mental state, they must give defendant the benefit of the doubt. The court instructed in the same terms that intoxication could be relevant to the intent to kill necessary to establish a manslaughter and to the mental element necessary for the kidnapping counts, that the accused took a child under the age of consent for an illegal purpose or with an illegal intent. Defendant argues that the court erred in failing to instruct on the relationship of intoxication to the intent necessary to prove a torture murder, that is, the intent to inflict cruel suffering.

We agree that a court should instruct a jury in a torture-murder case, when evidence of intoxication warrants it, that intoxication is relevant to the requisite specific intent to inflict cruel suffering. Penal Code section 22 makes evidence of voluntary intoxication relevant on the issue of whether the defendant actually formed any required specific intent. CALJIC No. 4.21 advises courts to instruct on voluntary intoxication as it relates to any required specific intent. Instruction that intoxication is relevant to malice and intent to kill is not enough when a torture-murder theory is involved, as torture murder requires no proof of intent to kill, and the malice element of torture murder can be shown by the doing of an intentional act involving a high probability of death committed with conscious disregard for human life.

(People v. Davenport, supra, 41 Cal.3d 247, 267.) Torture murder involves a unique specific intent which the standard instructions on murder do not cover, so that when intoxication is relevant to the formation of specific intent, the instruction on intoxication should be related to the specific intent involved in torture.

However, as the previous discussion shows, there was not substantial enough evidence of intoxication in this case to require the giving of the instruction, and failure to give the instruction was not a violation of the Eighth and Fourteenth Amendments to the United States Constitution.

D. Flight Instruction.

Defendant contends that the court erred in instructing pursuant to CALJIC No. 2.52 (4th ed. 1979 bound vol.) that flight after a crime may be considered in determining guilt or innocence, with the weight of the evidence being for the jury to decide. He argues that there was no evidence of flight, that the flight instruction should not be given when the identity of the perpetrator is in issue and that as a matter of due process California must adopt the rule that before the flight instruction may be given, there must be evidence that before he fled, the defendant knew he had been accused.

Penal Code section 1127c requires that whenever evidence of flight is relied on to show guilt, the court must instruct the jury that while flight is not sufficient to

establish guilt, it is a fact which, if proved, the jury may consider. This statute was enacted to abolish the common law rule that the jury could not be instructed on flight unless there was evidence defendant knew he had been accused. (People v. Hill (1967) 67 Cal.2d 105, 120-121; People v. Olea (1971) 15 Cal.App.3d 508, 515-516.) Defendant's argument that we must revive the knowledge requirement as a matter of due process is unpersuasive. He argues that there can be no logical inference of consciousness of guilt unless the accused knows he is accused and flees, and that instructing the jury that they may make totally illogical inferences is a violation of due process.

This is essentially a substantive due process argument. Instruction on an entirely permissive inference is invalid as a matter of due process only if there is no rational way the jury could draw the permitted inference. (See Ulster County Court v. Allen (1979) 442 U.S. 140, 157, 165; Leary v. United States (1969) 395 U.S. 6, 36; Tot v. United States (1943) 319 U.S. 463, 467.) Defendant has referred us to federal cases which question the strength of the inference of consciousness of guilt from evidence of flight and which assert that the inference is strengthened when there is evidence that

the defendant knew he was accused when he fled.[7/] None of these characterizes the inference of consciousness of guilt from evidence of flight as irrational. In fact, the pattern federal instruction on flight[8/] requires that the defendant know he has been accused of the crime only if the flight was not immediately after the crime. This instruction or similar instructions are used in many circuits.[9/] The instruction at issue here tells the jury that the weight to be given to evidence of flight is for them to decide; the inference is clearly permissive. As there is a rational basis for inferring that if a person flees immediately after a crime to avoid detection, he may do so because he believes himself to be guilty, we conclude that defendant's due process claim is without merit.

7/ See, e.g., U.S. v. Jackson (7th Cir. 1978) 572 F.2d 636, 641; U.S. v. White (8th Cir. 1973) 488 F.2d 660, 662; Embree v. U.S. (9th Cir. 1963) 320 F.2d 666.

8/ See Devitt and Blackmar, Federal Jury Practice and Instructions (4th ed. 1990) section 15.08.

9/ See U.S. v. Touchstone (6th Cir. 1984) 726 F.2d 1116; U.S. v. Borders (11th Cir. 1982) 693 F.2d 1318, certiorari denied 461 U.S. 905; United States v. Harman (9th Cir. 1980) 632 F.2d 812; United States v. Hernandez-Miranda (9th Cir. 1979) 601 F.2d 1104; United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1048, appeal after remand 572 F.2d 506, certiorari denied 439 U.S. 847; United States v. Stewart (5th Cir. 1978) 579 F.2d 356, certiorari denied 439 U.S. 936.

Defendant also maintains that there was insufficient evidence of flight to warrant giving the instruction. He argues that the evidence was that he was passing through Parker on his way to Texas, so that the fact that he was discovered in Texas two weeks after the crime was not evidence that he had fled from the scene with any consciousness of guilt. Of course, evidence that the accused left the scene and went home is not evidence of flight that necessarily supports an inference of consciousness of guilt. (See People v. Turner (1990) 50 Cal.3d 668, 695; People v. Green (1980) 27 Cal.3d 1, 37.) In this case, however, there was some evidence that defendant thought he had secured a job in Parker and planned to stay there awhile, and that he had flirted with a bartender and would have gone home with her had he been invited. Assuming that the jury could legitimately have decided that he was the perpetrator, they could have inferred that his sudden change of plans showed consciousness of guilt.

Defendant also argues that it was error to give the flight instruction under the rule of People v. Aniell (1979) 100 Cal.App.3d 189, that the instruction should not be given when identity is in issue. We disapproved the broad language of Aniell in People v. Mason (1991) 52 Cal.3d 909, 943, footnote 13. We explained: "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to

instruct on flight." (Id., at p. 943.) Obviously a flight instruction is correctly given "where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator, from which the jury could reasonably infer a consciousness of guilt." (People v. Rhodes (1989) 209 Cal.App.3d 1471, 1476.) As that is exactly the case here, there was no error in giving the flight instruction.

E. Malice Instruction.

Defendant argues that the court improperly excised the definition of express malice from CALJIC No. 8.11, which defines malice for the jury. The court did give the portion of the instruction which defines implied malice. The omitted language was "Malice is express when there is manifested an intent unlawfully to kill a human being." Defendant argues that the "inexplicable" failure of the court to give the instruction deprived defendant of the right to have the jury determine every material issue presented by the evidence. He argues that the omission of the definition of express malice made the rest of the instructions confusing and may have suggested to the jury that they could find a first degree murder without finding express malice.

The People argue that any error was invited. We need not reach this point because it is evident from the instructions as a whole that the jury was properly instructed

on malice and that the omission defendant complains of could not have prejudiced him. The court told the jury that an essential element of murder is malice aforethought. It told the jury that murder "is the unlawful killing of a human being with malice aforethought." It informed them that malice may be either express or implied, that "[a]ll murder which is perpetrated by any kind of wilful, deliberate and premeditated killing with express malice aforethought is murder of the first degree." And, using language similar to that which defendant complains was omitted from CALJIC No. 8.11, the court instructed that the jury could find first degree murder "[i]f you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was a result of deliberation and premeditation so that it must be formed upon pre-existing reflection. . . ." By contrast, the court told the jury that it could find only second degree murder if it found an unlawful killing "as a direct causal result of an intentional act involving a high degree of probability that it will result in death, which act is done for a base antisocial purpose and with wanton disregard for human life." The court had used exactly these terms to define implied malice. The jury was left with a clear

instruction that it could find first degree, premeditated murder only if it found express malice.10/

F. Instruction on Destruction of Evidence.

Defendant argues that the court improperly instructed the jury, over defense objection, regarding attempts to suppress or destroy evidence showing consciousness of guilt. Defendant's argument is that there was no evidence to support the instruction. But the evidence of his offer of $500 to informant Hicks to kill informant Howard, to prevent Howard from testifying against defendant, is clearly evidence of an attempt to suppress evidence, and arguably it was also evidence of an attempt to intimidate a witness. Defendant's argument that this conversation with Hicks about killing Howard was mere jailhouse rhetoric is unpersuasive; the evidence was suggestive enough to allow the jury reasonably to conclude that it showed a consciousness of guilt. "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by

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10/ The jury was correctly instructed that deliberate intent to kill is not necessary to either the felony-murder or the torture-murder theories.

a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference." (People v. Hannon (1977) 19 Cal.3d 588, 597.) The trial court here did not err in finding that the jury could reasonably infer consciousness of guilt from the request that Hicks kill Howard.

Defendant also argues that the instruction was defective because it failed to tell the jury that it may only draw an inference of consciousness of guilt if every fact necessary to support the inference has been proven beyond a reasonable doubt. However, if we look at the instructions as a whole, the jury was instructed as defendant desires. The court instructed the jury pursuant to CALJIC No. 2.01 on the use of circumstantial evidence, and this instruction states in pertinent part: ". . . before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt." Thus the jury was told that before they could use an inference of consciousness of guilt as circumstantial evidence of guilt, they must find any fact upon which the inference rested proved beyond a reasonable doubt.

G. Admissibility of Testimony of Informants Hicks and Howard.

Defendant alleges that the state deliberately made use of Howard as a government agent to elicit incriminating

statements from him in violation of his Sixth Amendment right to counsel. The evidence was that sometime between September 4 (when he was arraigned and the public defender appointed) and September 6, 1981, defendant talked about the charged crimes to Howard, who was housed near him in the protective custody unit in the San Bernardino County jail. Howard went to Sergeant Mauldin to say that he needed to talk to someone in homicide investigations, because defendant was talking about the crime. Mauldin arranged for him to talk to Detective Lake. Mauldin, though he had been acquainted with Howard for some time, was unaware that he had previously acted as an informant. Mauldin did not ask Howard to keep his ears open about defendant, did not tell Howard to come back if he got more information and did not make any offers or promises of benefits to Howard.

On September 6, 1981, Detective Lake talked to Howard about his information. He did not know Howard had been an informant in the past. He had not known that Howard was housed near defendant. He did not recruit Howard to talk to defendant. He never told Howard to keep his eyes and ears open. He did not ask Howard to talk to defendant again. He made no promise of benefit or leniency to Howard. When Howard offered to come back if he got more information, Lake told Howard that Howard was not working for the sheriff's department.

Detective Stalnaker, one of the investigating officers in the case, interviewed Howard on September 13, 14 and 22, after Howard told Mauldin that he had more information. Stalnaker, too, said that he did not know Howard had been an informant in the past. He said he had no control over defendant and Howard's housing, and had made no effort to place them together. He did not tell Howard to keep his ears open or to come back if he heard anything more, nor did he give Howard any incentive to keep informing. Stalnaker made it clear to Howard that Howard was not an agent of the sheriff's department. In these interviews, Howard talked about both his first conversation with defendant, and about later ones, in which defendant described the offenses in great detail.

Detective Lake and a Detective Wilson interviewed Howard again on September 28 and October 2, as Howard had had additional conversations with defendant. Wilson also said that he did not tell Howard to keep his ears open or otherwise solicit Howard's information.

Howard confirmed that he had initiated each interview with the authorities, that they never made him any promises of benefits or leniency, that they made it clear to him that he was not their agent and that they did not ask him to keep his

ears open or to come back if he heard anything else.11/ He said that he spoke to the police for his own reasons, not in response to any offer or promise of reward. Howard also denied asking defendant questions and said defendant had volunteered all the information, though ultimately Howard conceded he had asked some questions.

Lake, Stalnaker and the district attorney in defendant's case testified for Howard in the penalty phase of Howard's capital trial.

The trial court found that the initial contacts were made by Howard, that the sheriff's office did not solicit his help, ask him to question defendant or get information for them, and that the sheriff's office did not make any promises of reward or leniency to Howard. The court further found: "I do find, however, that the Sheriff's Office made it known to Mr. Howard that they were available to discuss whatever he did find or hear about the defendant. [¶] Based upon that thus far -- and I further find, really, that within at least one week of the first contact the District Attorney's office knew of what was going on as far as incriminating statements were concerned." The court found further that "he is not a police

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11/ Howard recanted this assertion at the reference hearing on our order to show cause. The effect of this recantation is considered in the discussion of the petition for writ of habeas corpus, post, at page 88 et seq.

agent, either expressly or impliedly, that the law enforcement officials did not induce Mr. Howard to seek, elicit, or otherwise obtain information of an incriminating nature from the defendant, Mr. Pensinger." After a recess and reading some of the relevant case law, the court made its final finding: "The Court makes an addition to the findings made yesterday, to reiterate some of the findings and add to them as follows: One, that at no time was the witness Howard solicited by any law enforcement to get information from the defendant, Mr. Pensinger; two, that all statements made by the defendant to the witness Howard were voluntary; three, that the witness Howard was not a police agent, either expressed or implied; fourth, that the witness Howard did not ask for, expect, or receive any benefits from law enforcement, the district attorney's office and/or the judiciary; five, the law enforcement officials did not promise, either expressly or impliedly in any form at any time any benefits to witness Howard in return for testimony."12/

12/ Though the motion to exclude filed in the trial court technically referred to all statements defendant made to informants, and thus included statements to Hicks, trial counsel apparently abandoned the claim as to Hicks, putting on no evidence and making no argument regarding Hicks. On appeal, defendant again claims that statements to both Howard and Hicks were taken in violation of his Sixth Amendment rights, but refers us to no facts and makes no arguments specifically relating to the Hicks statements. Accordingly, the Hicks statements are not discussed.

Defendant argues that the trial court erred by overlooking Howard's obvious incentive as a capital defendant to obtain any possible advantage from the police, and his history as an informant. These, he argues, clearly show that Howard had an implied agency relationship with the police, which the police exploited.

It is a denial of the Sixth Amendment right to counsel to admit evidence of an indicted defendant's incriminating statements deliberately elicited from the defendant by a government agent. (Massiah v. United States (1964) 377 U.S. 201; see also United States v. Henry (1979) 447 U.S. 264.) "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. . . . [K]nowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." (Maine v. Moulton (1985) 474 U.S. 159, 176; see also People v. Whitt (1984) 36 Cal.3d 724, 741-742.; People v. Williams (1988) 44 Cal.3d 1127, 1140-1141 [Sixth Amendment does not prevent the

state from using information gathered on the inmate's own initiative].) The high court has refined its position, holding in Kuhlmann v. Wilson (1986) 477 U.S. 436 that there is no Sixth Amendment violation when the cellmate is a passive listening post: "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." (Id., at p. 459; see also People v. Hovey, supra, 44 Cal.3d 543, 560.)

This case was litigated before Kuhlman was decided, so the parties did not focus on whether Howard merely listened to defendant or actually questioned him. But even under Massiah and Henry, we see no evidence that the government used Howard deliberately to elicit information. The only factors tending to show that Howard was acting for the police as an agent were that they talked to him so many times, and that they and the prosecutor testified in his behalf at the penalty phase of his capital trial. However, the evidence at the hearing was, and the trial court found, that no one ever made Howard any promise of benefit or leniency in return for his testimony. It is impossible on this record to conclude that his statements to the police were motivated by any promises of the police or prosecutor. And, though the police interviewed Howard about

defendant's statements on six occasions, each interview was at Howard's instigation. The authorities repeatedly told Howard he was not their agent, and to expect no reward. Here, as in Howard, supra, 44 Cal.3d 375, 398, and Whitt, supra, 36 Cal.3d 724, we have a case in which none of the officers involved knew of Howard's history as an informant and Howard's housing arrangement had nothing to do with any hope of eliciting information from defendant. Unlike in Whitt, no officer ever promised Howard any benefit. No one asked him to perform any service. The police simply made use of Howard's own motivation to inform on defendant, a technique we found not to be a knowing subversion of the defendant's right to counsel in Whitt, supra, 36 Cal.3d at pages 742-743. On this record, we must affirm the trial court's ruling that the authorities did not deliberately elicit incriminating statements in violation of defendant's Sixth Amendment right to counsel.13/

13/ Defendant also asks that we impose a duty on trial courts to instruct the jury sua sponte to view informants' testimony with caution. We adhere to the view that no sua sponte duty should be imposed. (See People v. Carrera (1989) 49 Cal.3d 291, 314-315; People v. Hovey, supra, 44 Cal.3d 543, 565-566; compare Pen. Code, § 1127a [providing for cautionary instruction on the request of a party].) Since we do not view informants' testimony as inherently unreliable (People v. Alcala (1984) 34 Cal.3d 604, 624), we reject defendant's argument that the use of such testimony undermines the reliability of the fact-finding process in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

H. Prosecutorial Misconduct.

Defendant argues that the prosecutor improperly appealed to the passion and prejudice of the jury in closing argument when he said: "Suppose instead of being Vickie Melander's kid this had happened to one of your children." Such appeals to the sympathy or passion of the jury are misconduct at the guilt phase of trial. (People v. Fields (1983) 35 Cal.3d 329, 362-363.) Defense counsel promptly objected. The court sustained the objection and directed the district attorney to leave the subject. Defendant maintains that the trial court's failure to admonish the jury to disregard the statement prejudiced him. We see no reasonable probability that a result more favorable to defendant would have been reached if the court had admonished the jury. (People v. Watson (1956) 46 Cal.2d 818, 836.) The prosecutor's comment was an isolated one and it was not repeated. The misconduct did not add cumulative impact to other errors in a crucial area of the case. Moreover, the court said that it was sustaining the defendant's "speaking" objection, and told the prosecutor to go on to another subject. This was a telling indication to the jury that the argument was improper and to be disregarded.

Defendant also argues that the prosecutor committed misconduct in arguing facts not supported by the record when he argued that the crime was done by someone who was "very violent, a maniac," that "Mr. Pensinger, from the evidence, is

just a perverted maniac," and that the three jailhouse informants could be under a "possible death sentence for testifying in this case." There was no objection to any of these statements, so the argument cannot be raised for the first time on appeal unless a timely admonition could not have cured the harm. (People v. Green, supra, 27 Cal.3d 1, 34.) Defendant does not argue that an admonition could not have cured the harm and, in any case, there was evidence in the record which, if the jury believed it, would warrant each of the arguments. (Compare People v. Thornton (1974) 11 Cal.3d 738, 762-763 [prosecutor may call defendant a sadist when evidence shows brutal sexual attack and intent to inflict pain on victim].) A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury. (People v. Fields, supra, 35 Cal.3d 329, 362-363; People v. Fosselman (1983) 33 Cal.3d 572, 580-581.) We do not think that the statements defendant objects to here exceeded the bounds of proper argument.

Defendant finally argues that the prosecutor engaged in misconduct by appealing to the passion of the jury and stating his own personal belief in the guilt of the accused when he said: "I like to win cases and this is a big case . . . there were certain things I wasn't going to do or

compromise in order to win cases." Again, there was no objection to this comment.

The context of the remark was that the prosecutor was rebutting the defense argument that he had prepared Michael, Jr., to commit perjury. The prosecutor told the jury that while he always wanted to win cases, he had long ago decided that suborning perjury was not one of the things he was going to do to win. This was a legitimate argument in rebuttal.

I. Ineffective Assistance of Counsel.

On direct appeal, defendant argues that defense counsel was incompetent because he was not aware that the diminished capacity defense was still available to defendant and that this "may well have influenced his choice of defense strategy and tactics, and may have caused less evidence and less emphasis to be placed on the issue of appellant's mental state at the time of the crime."

A defendant claiming ineffective assistance of trial counsel has the burden of showing that counsel failed to act in a manner to be expected of reasonably competent counsel, that "counsel's representation fell below an objective standard of reasonableness. . . ." (Strickland v. Washington (1984) 466 U.S. 668, 688.) Defendant must also show prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." (Id. at p. 694; see People v. Ledesma (1987) 43 Cal.3d 171, 217-218.) The appellate court must look to the record to determine whether there is any explanation for counsel's acts or omissions. When the record is silent on the reason that counsel acted as he did "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these cases are affirmed on appeal." (People v. Pope (1979) 23 Cal.3d 412, 426.)

The record does not show the basis for trial counsel's decision not to put on a diminished capacity defense, or whether he investigated or failed to investigate such a defense. Counsel's failure to object to the instruction may have been a result of a misunderstanding of the effective date of the abolition of the defense of diminished capacity, as defendant argues, but it could equally have been the result of a determination that there was no meritorious diminished capacity defense to be made. Whether this evaluation of the diminished capacity defense was a competent decision or not does not appear on the record, and any argument on this point

must be raised by way of petition for writ of habeas corpus. (See People v. Pope, supra, 23 Cal.3d at p. 426.)[14/]

Defendant also argues that counsel was ineffective when a potential defense witness (Deputy Strom) was excluded under our decision in People v. Shirley (1982) 31 Cal.3d 18, because he had been hypnotized, counsel failed to argue that Shirley should not apply retroactively. However, we can hardly charge counsel with incompetence for failing to make an argument which we rejected as wrong (see People v. Guerra (1984) 37 Cal.3d 385), and even if counsel should have made the argument, there is no possibility of relief, since on retrial, Guerra would require the court to again rule that the witness could not testify.[15/]

14/ Defendant conceded the point as to the habeas corpus proceeding at the reference hearing on the order to show cause.

15/ In a supplemental brief filed shortly before oral argument, defendant argued in connection with his other ineffective assistance of counsel claims that the exclusion of Strom's testimony under Shirley denied him the constitutional right to compulsory process. Trial counsel conceded that Shirley required the exclusion of Deputy Strom's testimony, and did not make the due process claim below. Since defendant can point to no authority holding that a rule excluding testimony of witnesses (other than a defendant's) because of pretrial hypnosis violates the right to compulsory process, we can hardly charge trial counsel with incompetence for failing to make the argument. (Compare Rock v. Arkansas (1987) ___ U.S. ___ [107 S.Ct. 2704] [per se rule excluding testimony of hypnotized defendant violates Fifth and Sixth Amendments].) In any case, this argument is based only on speculation as to the value to defendant of the missing testimony. The evidence in connection with the hearing under Shirley shows that Strom saw defendant after defendant left Vickie Melander, about the time the kidnapping must have taken place. Though the officer said he saw defendant come into a restaurant at this crucial time, there was no testimony indicating whether or not the officer had an opportunity to look into defendant's truck. Given the penchant of all the participants to leave the children

(Footnote continued on next page.)

Finally, defendant argues that he received ineffective assistance of counsel because counsel failed to object to the use of the alias "Panama Red" on the information and verdict forms. It is generally unnecessary to use an alias in the charging document, and if the indictment uses what are obviously criminal aliases (we gave the example "Slippery Jack") without some good reason, there could be prejudicial error. (People v. Maroney (1895) 109 Cal. 277, 280-281; see also People v. Hawley (1930) 106 Cal.App. 216, 218-219 [error in reading string of aliases on indictment harmless]; United States v. Beedle (3d Cir. 1972) 463 F.2d 721, 725 [alias should not be used in indictment unless necessary to identify accused or protect him from double jeopardy]; but see United States v. Payden (S.D.N.Y. 1985) 613 F.Supp. 800, 823-824 [if evidence of

(Footnote continued from previous page.)
unattended in cars, Strom's testimony would not exonerate defendant unless Strom had an opportunity to look into the truck. Finally, as for the claims that the hypnosis was conducted in bad faith or represented a failure to preserve exculpatory evidence (again a claim that could have been, but was not raised below), the evidence is uncontroverted that the police had a policy of not hypnotizing anyone who was likely to become a witness, and that Deputy Strom was considered unlikely to become a witness.

alias relevant and admissible, alias on indictment will not be stricken].)

On the record before us, we cannot say that it was ineffective assistance of counsel to fail to object to the use of the alias Panama Red on the indictment and the verdict forms. Defendant's use of the alias was a contested issue. Defendant admitted that Vickie Melander introduced him as Panama Red on the day of the offenses, and that he had not objected, but he maintained that he had not used the name before and that it had not been his idea to use it. Several of the witnesses knew him only by that name, including Michael, Jr. Defense counsel argued to the jury that the investigation of the crime had always focussed on "Panama," that the police were not interested in following any other leads, though they existed, and that Vickie Melander was responsible for planting the name Panama on defendant and assuring that suspicion would focus on him. Under the circumstances, we can say neither that there could be no competent tactical reason for a decision not to object to the use of the alias on the information and verdict forms, nor that the fact that the jury heard and saw the alias on these documents was prejudicial.

J. Jury Selection.

Defendant asks us to reconsider whether exclusion from the guilt phase jury of persons who would automatically vote

against the death penalty results in a jury which is biased and unrepresentative. We rejected this contention in Hovey v. Superior Court (1980) 28 Cal.3d 1, and People v. Fields, supra, 35 Cal.3d 329, and the United States Supreme Court subsequently rejected it in Lockhart v. McCree (1986) 476 U.S. 162. There is no need to reconsider the point. (See People v. Thompson (1990) 50 Cal.3d 134, 157.)

III. SPECIAL CIRCUMSTANCES ISSUES

A. Torture-murder Special Circumstance.

The torture-murder special circumstance "requires proof of first degree murder (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim." (People v. Davenport, supra, 41 Cal.3d 247, 271.)

The jury was not instructed that the special circumstance required proof of intent to inflict torture. Failure to instruct on an essential element of a special circumstance is not reversible error per se, but is subject to a Chapman (Chapman v. California (1967) 386 U.S. 18) harmless error analysis. (People v. Garrison (1989) 47 Cal.3d 746, 789.) When there is confusion with respect to instructions on an element, rather than a complete omission, a lower standard of review applies. (See People v. Wade (1988) 44 Cal.3d 975, 994-995.) We cannot accept the People's argument that intent

to torture was established by the guilt verdict on the first degree murder charge; as the People concede, the first degree murder verdict may have been based on a theory that the murder was premeditated and deliberate, a theory which obviously does not require any proof of intent to torture. We cannot say in this situation that the jury necessarily resolved the issue of intent to torture against the defendant.

This case is distinguishable from People v. Wade, supra, 44 Cal.3d 975, 994, where we said that a jury would not be misled by the omission of the intent-to-torture element of the torture-murder special circumstance. There, it was clear that both the People and the defendant had focussed on the intent to torture, and defendant's capacity to form that intent, as to the murder charge. Defense counsel in Wade specifically discussed the question of intent to torture in his arguments to the jury. Here, neither counsel discussed the question, either in the context of the murder charge or the special circumstance allegation.

Nor can we agree with the People that the evidence overwhelmingly established intent to torture. While there was sufficient evidence of intent to torture to sustain a verdict of first degree murder on that theory, the evidence was not overwhelming. The pathologist was not able to say whether the mutilation of the child occurred while she was still alive; the other wounds could have been inflicted in an instantaneous

burst of violence. The defendant's statements to jailhouse informants were inconsistent, but there was no explicit expression of an intent to inflict cruel pain. This element of intent was not made an issue either as to the first degree murder charge or the torture-murder special-circumstance allegation; in fact, as noted, neither counsel mentioned it in argument to the jury. On this record we cannot conclude that error in failing to instruct on the element of intent to torture was harmless. We therefore reverse the torture-murder special-circumstance finding.

B. Kidnap-murder Special Circumstance.

Defendant attacks the kidnap-murder special circumstance on four grounds. First, he argues that the court erred in not instructing sua sponte that there could be no kidnap-murder if the kidnap was merely incidental to the murder, citing People v. Green, supra, 27 Cal.3d 1, 61. Defendant's argument that a properly instructed jury could have found that the kidnap was wholly incidental to the murder of Michelle is totally inconsistent with his first argument that there was insufficient evidence of premeditation and deliberation to support the verdict. His Green argument would require the jury to believe that at the time defendant drove off with the children, his purpose was to kill Michelle, and that there was no other independent wrongful purpose involved. While we found sufficient evidence of premeditation and

deliberation to support the verdict, we see no substantial evidence that defendant's sole purpose at the inception of the kidnapping was to murder Michelle. Under the circumstances, the Green doctrine cannot be called a general principle of law "closely and openly connected with the facts before the court" giving rise to a sua sponte duty to instruct. (See People v. Phillips (1985) 41 Cal.3d 29, 60; People v. Robertson (1982) 33 Cal.3d 21, 52; People v. St. Martin (1970) 1 Cal.3d 524, 531.)

Defendant next contends that the kidnap-murder special-circumstance finding must be set aside for the court's error under Carlos v. Superior Court (1983) 35 Cal.3d 131, in failing to instruct that intent to kill is a necessary element of the special circumstance. People v. Anderson (1987) 43 Cal.3d 1104 overruled Carlos and established that intent to kill need be proved for a felony-murder special circumstance only when the defendant was an aider and abettor and not the actual killer. (Id. at pp. 1138-1147.) The Anderson rule applies to pre-Carlos offenses, such as this one. (People v. Poggi (1988) 45 Cal.3d 306, 326-327.)16/ As all the evidence was that defendant was the actual killer if he was involved at all, the

16/ Contrary to defendant's claim, retroactive overruling of Carlos v. Superior Court, supra, 35 Cal.3d 131, is not an unconstitutional ex post facto expansion of criminal liability. (People v. Poggi, supra, 45 Cal.3d at pp. 326-327; see also People v. Whitt (1990) 51 Cal.3d 620, 637.)

special circumstance finding must be sustained. Further, defendant's intent to kill was established by the jury when it found the torture-murder special circumstance true, as that allegation was that "[t]he murder was intentional and involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).)

Defendant also attacks the kidnap-murder special circumstance on the ground that the jury was not instructed that the allegation requires proof of both a simple and an aggravated kidnapping, proof that defendant alleges Penal Code section 190.2, subdivision (a)(17) requires. We specifically rejected this argument in People v. Bigelow (1984) 37 Cal.3d 731, 755, and it will not be reconsidered here.

Finally, defendant attacks the kidnap-murder special circumstance on the ground that the court failed to instruct on a lesser included offense as to the kidnap of Michael, Jr., Since the court did not tell the jury that only the kidnap of Michelle could support the kidnap-murder special circumstance, it is urged that the kidnap-murder special-circumstance finding was based on the kidnap of Michael, Jr., as to which there was the claimed instructional error. We see absolutely no basis for this argument, as a matter of state law or as a matter of federal due process, even assuming that the court should have instructed on a lesser included offense as to the kidnapping of

Michael, Jr. The jury convicted defendant of the separate crime of kidnap of Michelle, and defendant presents no argument that there was any instructional error as to that conviction. It is inconceivable that the jury found defendant murdered Michelle in the course of kidnapping Michael, Jr., but did not conclude that the murder had also occurred during the kidnapping of Michelle.

We conclude, therefore, that we must set aside the torture-murder special-circumstance finding, but that there is no basis for setting aside the kidnap-murder special circumstance.

IV. PENALTY PHASE

At the penalty phase, the prosecutor presented evidence that in August 1981, defendant was in Midland, Texas, and spent an evening at a bar drinking. He danced with a 10-year-old girl, Angela. In the early morning hours Angela's older sister reported that Angela had been taken out of the bar. Two men followed the truck this girl pointed out, and saw defendant driving it and Angela in the passenger seat. They drove up and yelled at him to stop, and he laughed in a way each man described as "weird" and drove off. They chased him, and finally hit his truck with their car and forced him off the road. Angela jumped out and ran to one of the men, who was a friend of her family, and said that defendant had said that he was "going to make love" to her. Both this man, and

her mother who saw her a little later, said that she appeared hysterically frightened. The other man beat defendant severely while defendant laughed. Defendant tried to run away, but both men tackled him and forced him into the back of their car. When he laughed again, one of the men beat him and told him he was a pervert. Defendant started crying and said, yes, that he was a pervert.

Inmate Hicks testified that defendant told him that when defendant went to Texas he had grabbed another little girl and that he was going to take her to a remote area and do the same thing that he had done in Parker, but before he could get away with it he was caught and beaten up by two cops. Defendant said he had gotten out of it because the mother was so happy to get her child back that she did not press charges.

The prosecution also presented evidence that before the charged offenses, in January and February 1981, defendant had lived in Hillsboro, Oregon, with one Molly Dickson and worked with her at a local Kmart store. After he moved in with the young woman, her friend and coworker, Trudy Coerver, also moved in, causing defendant some jealousy. Toward the end of February, Dickson asked defendant to move out. A week or so later her car was vandalized, the tires stabbed repeatedly with an ice pick and then slashed with a knife. She confronted defendant with this and he said he could not stop it, that "Donovan" was doing it and that he had no control over

Donovan. After he went back to California he called her to say that he wanted to pay for the damage to the tires and she said, so you did slash them, and he was silent. He did not use the name Panama and never was violent, nor had he ever threatened her with violence. Trudy Coerver testified that at the end of March or beginning of April 1981, her car was vandalized. Defendant appeared at her workplace, staring at her and cleaning his fingernails with a knife. When she talked to defendant, he said that he had a friend, Donovan, who was after them. He also said that his nickname in California was Panama.

Coerver had a confrontation with defendant toward the end of March in which defendant said that if she and Dickson ever turned their backs he would kill them if he found them alone together. Another coworker, Angela Gordenair, said she talked to defendant, and he said that Donovan was the one who had slashed the tires, that defendant could not stop Donovan and that Donovan was very mean and was going to kill them all. She said that she accused defendant of being Donovan himself, and that "his eyes got weird" and he said that "Donovan used to like you but now you're dead." She also said that he had told her that he had the nickname of Panama.

The defense put on evidence that defendant had lived with his aunt, Penny Meyer, and her 2 daughters in May and June of 1981, and that she had no trouble with him and her 12- and 14-year-old daughters. Defendant had worked with his uncle

Thomas Meyer in the carpet laying business. When he accidentally burned one of the girls with his cigarette, he apologized and bought her flowers. They took trips together, including one to Lake Havasu. He displayed no violence or dishonesty until he stole their truck.

Janet Burns, another of defendant's aunts, said that he came to live with her in June or July 1981, and that he presented no problem with her girl, 11, and boy, 8. She never heard him use the names Donovan or Panama, and on the night before he took off in the Meyer's truck, he showed no signs of disturbance.

V. PENALTY PHASE ERROR

A. Oregon Evidence.

Defendant argues that the evidence of his behavior in Oregon was inadmissible because it was irrelevant to any statutory factor in aggravation. In particular, he claims that the evidence did not qualify as evidence of other criminal activity involving violence under Penal Code section 190.3, factor (b). We disagree.

Evidence of prior criminal behavior is relevant under Penal Code section 190.3, factor (b) if it shows "conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. . . ." (People v. Phillips, supra, 41 Cal.3d 29, 72; see also People v. Walker (1988) 47 Cal.3d 605, 639; People v. Belmontes (1988) 45 Cal.3d 744,

vandalized, defendant appeared at the restaurant where the young woman worked, and sat cleaning his fingernails with a butcher knife and staring at her. He had already told Ms. Dickson that his friend Donovan had done the deeds, and that Donovan was "out of control." In the circumstance in which the incidents occurred, that is, (1) the acrimonious break-up of a romantic relationship and defendant's apparent jealousy over Tracy Coerver's friendship with Molly Dickson, (2) the references to Donovan, who was out of control, and (3) the phone calls purportedly from Donovan, this episode in the restaurant could have put a reasonable person in fear of an imminent attack on the person. The threat to kill Dickson and Coerver, if they ever turned their backs and if defendant ever found then alone together, was conditional, but the conditions could easily be met -- Ms. Dickson was still nearby when the threat was uttered. Again, in light of defendant's past conduct and relationship with the two women, there would be sufficient evidence to support a guilty verdict for the Oregon crime of menacing. Finally, the last incident, in which Angela Gordenair accused defendant of being Donovan and defendant responded that "Donovan used to like you but now you're dead," clearly shows a threat that a reasonable person could interpret as one involving imminent harm. Though defendant had denied being Donovan, it was clear that Ms. Gordenair had seen through his charade and felt that defendant was Donovan. In this

context, a reasonable person could understand the threat as the speaker's own present threat to kill.

Nothing in the language of Penal Code section 190.3, factor (b) suggests that violation of a penal statute of another state, involving violent conduct which would not give rise to a criminal conviction in California, should be inadmissible as a factor in aggravation. The section refers to violation of "a" penal statute, rather than to a violation of "a California" penal statute. It is settled that a prior felony conviction from a foreign jurisdiction is admissible under Penal Code section 190.3, factor (c), even if it would not qualify as a felony under California law. (People v. Lang (1980) 49 Cal.3d 991, 1038-1039.) Though we have never considered the point directly, we have assumed that crimes as defined by other jurisdictions are within the ambit of section 190.3, factor (b). In People v. Phillips, supra, 41 Cal.3d 29, 72, we said, "The only reasonable interpretation is that the statute limits admissibility to evidence that demonstrates the commission of an actual crime, a requirement easily verified under the definitional guidelines established by legislative bodies in this and other jurisdictions." (Italics added.)

Defendant claims that an interpretation which would admit evidence of conduct which would only be a crime in a foreign jurisdiction would produce a less reliable capital sentencing scheme, since this court is "ill-equipped" to analyze the law of a foreign jurisdiction. This claim ignores the many situations in which state courts are required to interpret and give full faith and credit to foreign judgments. Our federal system of comity, and the law of conflict of laws, rests on the sound assumption that the courts of one state are able to interpret and apply the law of sister jurisdictions.

Defendant also points to Penal Code section 668, which provides for determinate sentence enhancements for foreign convictions only if the conduct was such as could have been punished under the law of California by imprisonment in the state prison. He claims that to allow defendant's conduct in Oregon to be considered in aggravation at the penalty trial is inconsistent with this section. The claim is meritless. Section 668 does not apply outside the realm of determinate sentence enhancements. (People v. Lang, supra, 49 Cal.3d at p. 1038.) Even if defendant is arguing by analogy, the comparison is not apt. A factor in aggravation, unlike a sentence enhancement, is simply a circumstance which may or may not affect one or more juror's moral, normative judgment regarding the appropriate penalty.

(See People v. Brown (1985) 40 Cal.3d 512, 540-544.) The existence of a factor in aggravation does not "enhance" the sentence; rather, it is considered relevant to a juror's evaluation of the appropriate penalty for one who has already been determined to be death-eligible.

Nor do we accept defendant's argument that use of the Oregon evidence would deny him the due process right to be convicted on sufficient evidence of criminal activity under Jackson v. Virginia (1979) 443 U.S. 307, 319. He has not been convicted of the Oregon crime of menacing; and in any case the jury was instructed not to consider the evidence of any other crimes mentioned at the penalty trial unless it was convinced beyond a reasonable doubt that the crimes had been committed. We conclude that the evidence of defendant's conduct in Oregon was admissible under Penal Code section 190.3, factor (b).

B. Jury Selection.

Defendant argues that the use of peremptory challenges to systematically exclude persons with reservations about the death penalty, whose reservations were not strong enough to warrant excusing them for cause, denied him the right to a neutral and impartial jury at the penalty trial. This argument has repeatedly been rejected. (People v. Carrera, supra, 49 Cal.3d 291, 331; People v. Keenan (1988) 46 Cal.3d 478, 503; People v. Melton (1988) 44 Cal.3d 713, 732; People v. Fields, supra, 35 Cal.3d 329, 373.)

C. Duplicative Charging.

Defendant next argues that the penalty verdict should be reversed because the jury erroneously was allowed to consider both the kidnap-murder special circumstance and the torture-murder special circumstance as aggravating factors, despite the fact that these were part of a single indivisible course of conduct under Penal Code section 654. We have repeatedly rejected the argument that section 654 is applicable in this context. (People v. Bean (1988) 46 Cal.3d 919, 954; People v. Melton, supra, 44 Cal.3d 713, 765-769.)

D. Sympathy Instruction.

Defendant also argues that the court misinstructed the jury on the role that sympathy for the defendant could play in their penalty determination. In People v. Brown, supra, 40 Cal.3d 512, 537, vacated sub nomine California v. Brown, 479 U.S. 538, we said that an instruction which denies a capital defendant the right to have the jury consider sympathy for the defendant violates federal constitutional requirements of an individualized sentencing process. We disapproved the giving of CALJIC No. 1.00, which tells the jury that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or

public feeling." The United States Supreme Court subsequently declared that the giving of CALJIC No. 1.00 is not unconstitutional per se. Rather, the instructions and arguments must be examined as a whole to determine whether the jury was adequately informed of the proper scope of mitigating evidence. (California v. Brown, supra, 479 U.S. 538, 546, conc. opn. of O'Connor, J.; People v. Walker, supra, 47 Cal.3d 605, 641.)

Here, defense counsel proposed a modification of CALJIC No. 1.00, excising the reference to sympathy and the admonition "that you must not be influenced by pity for a defendant or prejudice against him." Over the prosecutor's objection, the court gave defendant's proposed modification: "In this part of the trial, the law does not forbid you from being influenced by pity for the Defendant. However, the law does forbid you from being governed by mere conjecture, prejudice, passion or public opinion."

Defendant now contends that the modified instruction was self-contradictory, and may have confused the jury and left them questioning whether they could consider sympathy for the defendant. Putting aside the question of invited error, we do not agree with defendant's argument that a jury that is told that it is not to be swayed by passion, prejudice or sentiment but is specifically told that it can consider sympathy for the defendant is being instructed in

contradictory terms: the latter is simply an express exception to the general rule against reliance on emotional factors.

The court did err, however, in instructing the jury pursuant to CALJIC No. 1.00 that it must reach a "just verdict regardless of what the consequences of such verdict may be." A jury at the penalty trial must not be instructed to disregard the consequences of its decision. (People v. Clark (1990) 50 Cal.3d 583, 633; People v. Malone (1988) 47 Cal.3d 1, 43.) "It is constitutionally impermissible to instruct a jury in a manner that leads the jury to believe that ultimate responsibility for the determination of the appropriate punishment lies elsewhere. [Citations.]" (People v. Clark, supra, 50 Cal.3d 583, 633.) "In this context, an instruction to ignore 'consequences' can be understood by the jury in the same light as an admonition to disregard sympathy." (People v. Brown, supra, 40 Cal.3d at p. 537, fn. 7.)

Nonetheless, looking at the instructions and arguments as a whole, we conclude that the jury was not misled. It was specifically informed that it could consider pity for the defendant. Nothing in the argument of either counsel suggested to the jury that it should disregard the consequences of its penalty determination, or that responsibility for that decision lay elsewhere.

E. Factor (k) and Instructions on Mitigation.

The court instructed in the terms of Penal Code section 190.3, factor (k), without amplification. In People v. Easley (1983) 34 Cal.3d 858, 878, we found such an unadorned instruction "potentially confusing." Trial courts "should inform the jury that it may consider as a mitigating factor 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" (Id., at p. 878, fn. 10, quoting Lockett v. Ohio (1978) 438 U.S. 586, 604.) Subsequently, the United States Supreme Court found that unless there is a reasonable likelihood that the jury was otherwise misled, the unadorned instruction in the terms of factor (k) is constitutionally adequate. (Boyde v. California (1990) ___ U.S. ___, ___ [108 L.Ed.2d 316, 329].)

The instructions and arguments as a whole suggest that instructing in the terms of Penal Code section 190.3, factor (k) did not mislead the jury. (People v. Lucky (1988) 45 Cal.3d 259, 298; see also People v. Hunter (1989) 49 Cal.3d 957, 989-990; People v. Allison (1989) 48 Cal.3d 879, 900; People v. Burton (1989) 48 Cal.3d 843, 866-867; People v. Bonin (1989) 47 Cal.3d 808, 855.) The court did instruct the jury that it could consider pity for the defendant, and

it instructed the jury to consider all the evidence from both phases of trial in making its penalty determination. It also instructed the jury that it could consider any evidence of possible innocence as a factor in mitigation.

Defense counsel's argument did not turn on character and background evidence in mitigation, since his argument focused on lingering doubt. However, the arguments of counsel did not suggest to the jury that only evidence which mitigated the gravity of the crime could be considered in mitigation. The prosecutor argued that the only factor in mitigation was the defendant's youth, as he was 19 at the time of the crimes. This factor obviously goes beyond mitigation of the gravity of the crime, and admits the relevance of evidence regarding defendant himself.

F. Weighing Factors.

Defendant also argues that it was error to instruct in the language of Penal Code section 190.3 that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death." The argument is that such an instruction creates the danger that a juror will simply count up factors and vote for the death penalty because there are more aggravating circumstances, though the juror believes death is not the

appropriate penalty. (See People v. Brown, supra, 40 Cal.3d 512, 542 & fn. 13.)

However, as the People point out, the court did not simply instruct in the statutory language. The court instructed: "You have been instructed as to a number of factors that you may consider. In determining which penalty shall be imposed, you are further instructed that you are not to count the factors in aggravation and compare that with the number of factors in mitigation in determining which of the penalties shall be imposed. [¶] It is not the relative number of factors which shall determine the appropriate penalty, but rather the weight of the factors which shall determine which of the penalties is appropriate. One mitigating circumstance may be sufficient to support a decision that death is not the appropriate punishment in this case. You may assign to each of the factors the weight, if any, to which you believe it to be entitled."

Nor did the arguments of counsel tend to mislead the jury. The prosecutor did not argue that death was mandatory, or denigrate the jury's role in making a normative decision about the appropriate penalty. There was no error.

G. Constitutionality of Penal Code Section 190.3.

Defendant also argues that Penal Code section 190.3 is unconstitutional because it fails adequately to direct and limit the jury's discretion. He argues that the statute must

fail because (1) the statute does not specify which of the listed factors are aggravating and which are mitigating, (2) the statute does not require that the jury agree unanimously on the existence of each statutory aggravating factor, (3) the statute does not require the jury to specify in writing the factors upon which it relied, and (4) the statute does not require that the jury determine that aggravating circumstances outweigh mitigating beyond a reasonable doubt.

We have repeatedly rejected such claims, both as to the 1977 and 1978 death penalty laws. (People v. Douglas (1990) 50 Cal.3d 468, 541 [1978 law]; People v. Caro (1988) 46 Cal.3d 1035, 1068 [same]; People v. Howard, supra, 44 Cal.3d 375, 444 [same]; People v. Rodriguez, supra, 42 Cal.3d 730, 777-779 [same]; People v. Jackson (1980) 28 Cal.3d 264, 315-317 [plur. opn.], 318-319 [conc. opn. of Newman, J.] [1977 law]; People v. Frierson, supra, 25 Cal.3d 142, 176-180 [plur. opn.] [same].) There is no need to reconsider them here.

H. Corpus Delicti and Hearsay Evidence.

Defendant argues that though the jury was instructed at the penalty phase that other-crimes evidence required proof independent of extrajudicial confessions or admissions, there was insufficient corpus delicti to establish any crime in either the Texas or the Oregon incidents. This argument is patently absurd. The prosecutor must establish the corpus

delicti of any crime independently of any extrajudicial statements of the defendant, but this requirement only means that the prosecutor must show the fact of an injury, loss, or harm, and the existence of a criminal agency as its cause. (See 1 Witkin, Cal. Criminal Law (2d ed. 1988) § 136, p. 152 and cases cited.) Only a prima facie showing is required, and the corpus delicti may be proved by circumstantial evidence and inferences drawn from circumstantial evidence. (People v. Towler (1982) 31 Cal.3d 105, 115.) The evidence that defendant drove off with an 10-year-old girl at 1 in the morning without asking her mother's permission, that he tried to evade capture for at least half an hour, and that the girl emerged from his truck in hysterics, is ample as to the Texas incident. As for the Oregon incidents, most of the evidence did not come from admissions or confessions. In any case, as for the tire slashing, it is completely reasonable to infer a criminal agency from the fact that the tires were slashed with an ice pick. As for the menacing, the criminal agency was obvious.

Defendant further argues that the trial court improperly overruled his hearsay objection to evidence relevant to the Texas incident. Steve McKandles testified for the prosecution that he helped to chase defendant after defendant drove off with 10-year-old Angela. McKandles testified over defendant's hearsay objection that when he

finally ran defendant off the road, Angela jumped out of the truck and ran to McKandles, obviously frightened. He asked her what the defendant had done or said, and she responded that defendant said that he was going to make love to her. Defendant does not quarrel with the trial court's ruling that Angela's statement was a spontaneous declaration. (See Evid. Code, § 1240.) He argues, however, that the statement was only admissible to show the declarant's, that is, Angela's, state of mind, and that her state of mind was irrelevant; that the admission of the statement without cross-examination of Angela was a violation of the right of confrontation; and that the statement was double hearsay and that there was no hearsay exception for defendant's declaration. These arguments are meritless. Spontaneous declarations are admissible for their truth, not merely for the state of mind of the declarant. Defendant's constitutional argument is totally perfunctory, contained in one sentence alleging that since the jury could not weigh Angela's demeanor and test her credibility, admission of her statement was a violation of the right to confrontation. He cites no authority. Evidence admitted under a traditional hearsay exception does not violate the confrontation clause if there are sufficient indicia of reliability to allow the trier of fact to evaluate the truth of the out-of-court statement. (Ohio v. Roberts (1980) 448 U.S. 56, 63-66; Mancusi v. Stubbs (1972) 408 U.S.

204, 213.) Statements admitted under the spontaneous declaration exception to the hearsay rule are considered reliable because their spontaneity ensures that the declarant has not had time to reflect and fabricate. (Box v. California Date Growers Assn. (1976) 57 Cal.App.3d 266, 272.) Several Court of Appeal decisions have rejected the constitutional argument to which defendant alludes. (See In re Damon H. (1985) 165 Cal.App.3d 471, 477-479; People v. Jones (1984) 155 Cal.App.3d 653, 663; People v. Orduno (1978) 80 Cal.App.3d 738, 746-748.) Defendant makes no argument that there was anything about the facts of this case that made the declarant's statement unreliable. Defendant's final argument that the evidence was double hearsay, and that there was no hearsay exception for defendant's out-of-court statement, is equally meritless; his own statement was clearly admissible as the admission of a party. (See Evid. Code, § 1220.)

I. Limiting Instruction on Other Crimes.

Defendant also argues that the trial court erred in failing to give a limiting instruction telling the jury what other crimes the prosecutor was relying on as aggravating factors in the penalty phase. He points out that in People v. Robertson, supra, 33 Cal.3d 21, in conjunction with our

holding that the court must give a reasonable doubt instruction on other crimes at the penalty phase (id., at p. 55), we said that "[i]n order to avoid potential confusion over which 'other crimes' -- if any -- the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction . . . can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty. Without such a limiting instruction, there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind, because -- as already noted -- the jury is instructed at the penalty phase that in arriving at its penalty determination it may generally consider evidence admitted at all phases of the trial proceedings. [Citation.]" (Id., at p. 55, fn. 19; see also People v. Phillips, supra, 41 Cal.3d at p. 72, fn. 25.)

The jury was given the reasonable doubt instruction as to evidence of other crimes at the penalty phase, but there was no limiting instruction on which other crimes should be considered. We have not imposed any sua sponte duty to instruct in this area. (See People v. Phillips,

supra, 41 Cal.3d 29, 73, fn. 25; People v. Carrera, supra, 49 Cal.3d 291, 342.) There may even be tactical reasons why the defendant would not wish such an instruction. (People v. Phillips, supra, 41 Cal.3d at p. 73, fn. 25; see also People v. Easley, supra, 46 Cal.3d at p. 734.)

Defendant argues here that the jury may have used evidence from the guilt phase of his solicitation of the murder of Gary Howard, his theft of his uncle's truck, and his statement that he had a gun charge pending, as circumstances in aggravation. Defendant assumes, without demonstrating, that the district attorney could not have persuaded the court to instruct on any of these acts as other criminal activity. The theft of the truck obviously would not qualify, as it involved no violence, but a "weapons charge pending" and a possible solicitation of murder might have qualified. (See Pen. Code, § 653f, subds. (b) & (d).) Defendant fails to persuade that any instruction would have benefitted him.

J. Instruction on Admissions.

Defendant maintains that the court's failure to instruct the jury to view his admissions and adoptive admissions with caution was reversible error. (See CALJIC Nos. 2.71 & 2.71.5.) The Attorney General concedes the error but argues that it was harmless.

Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the

defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. (See People v. Bunyard (1988) 45 Cal.3d 1189, 1224; People v. Beagle (1972) 6 Cal.3d 441, 456 [harmless error: one statement heard by two witnesses, one of whom was defendant's friend; other statement heard by police officer; no conflict in evidence]; People v. Ford (1964) 60 Cal.2d 772, 799-800 [reversible error: witnesses reporting admission were hostile and inconsistent]; People v. Blankenship (1970) 7 Cal.App.3d 305, 311-313 [harmless error: witness relating admissions was highly credible and admissions were corroborated]; People v. Hunter (1969) 1 Cal.App.3d 461, 465 [police officer's testimony relating admissions was reliable and corroborated].)

As defendant points out, there was a considerable amount of important evidence at the penalty trial in the form of admissions and adoptive admissions of the defendant. Inmate Hicks testified that defendant told him that defendant would have done the same thing in Texas as he had in Parker had he not been stopped. Steve McKandles testified that the little girl who had been kidnapped said that defendant said he was going to make love to her. Randy Reed testified that when he accused defendant of being a pervert, defendant said, yes, that he was a pervert. Hicks's statement was crucial,

as it was the only evidence that defendant intended to kill the girl he had kidnapped in Texas. Hicks's credibility had been impeached at the guilt phase and his motives for testifying were questionable. However, we do not believe that the jury needed additional guidance in evaluating his testimony. Hicks was a central witness at the guilt phase, and the jury was fully instructed on the caution with which they should approach testimony about defendant's admissions at that stage. When the jury has had to carefully evaluate the credibility of a central prosecution witness's testimony about the defendant's confession at the guilt phase, it is almost inconceivable that the jury would need help in evaluating that same witness's credibility as to admissions at the penalty phase.

As for the testimony of Steve McKandles that Angela said that defendant said he was going to make love to her, it is true that the jury was not able to evaluate the reliability of the person hearing the admission, as she was not allowed to testify. However, her reliability in reporting defendant's admission is to be considered strong because of the spontaneity of her declaration, and the strong emotion under which she made it. Further, it was not only defendant's admission that connected him to the crime; he clearly took the little girl from the bar in the middle of the night and drove off with her, and had to be pursued and

forced off the road before he would give her up. Her statement about his admission was corroborated by these events. Finally, as to Reed's testimony that defendant said he was a pervert, Reed's credibility was not impeached, and the guilt phase evidence as well as the Texas incident itself tended to corroborate the statement.

Defendant also argues that the failure to give the cautionary instructions was prejudicial because of evidence of admissions and adoptive admissions in the Oregon incidents. He points to Molly Dickson's testimony that defendant said that Donovan had slashed her tires; Trudy Coerver's testimony that defendant said if she and Molly Dickson ever turned their backs on him, he would kill them; and Angela Gordenair's testimony that defendant said that Donovan was going to kill them all, and that "Donovan used to like you, but now you're dead." He also points to testimony of adoptive admissions, in that Dickson testified that defendant called her and offered to pay for her slashed tires, and when she accused him of doing the damage he was silent. Further, when Gordenair accused defendant of being Donovan, he did not deny it. However, defendant was unable to impeach the credibility of any of these witnesses. The witnesses corroborated each other as to defendant's use of the name Donovan. The guilt phase evidence that defendant had used the alias in Parker, Arizona, also corroborated

their testimony. As for the tire slashing, again Dickson's and Gordenair's testimony was consistent and there was guilt phase evidence from Hicks, admittedly not the most reliable of witnesses, that defendant had told him that he had done some tire slashing in Oregon.

We cannot say that the error in failing to instruct the jury to view admissions and adoptive admissions with caution was substantial or that there is any reasonable possibility that it affected the verdict.

K. Prosecutorial Misconduct.

Defendant argues that the prosecutor committed misconduct in the penalty phase by arguing factors in aggravation not included in the statutory list of aggravating factors. He points out that the prosecutor argued defendant's future dangerousness and lack of remorse, and also argued that the death penalty was appropriate because the defendant's crime was "heinous, atrocious, and cruel."

Defendant's future dangerousness was a central theme of the prosecutor's argument to the jury. Defense counsel did not object, and normally defendant's failure to object bars the issue on appeal, unless a timely admonition could not have cured the harm. (People v. Green, supra, 27 Cal.3d 1, 34.) In People v. Davenport, supra, 41 Cal.3d 247, we indicated that future dangerousness is an appropriate subject for argument, though it would be inappropriate to allow any expert testimony on the subject, since the United States Supreme Court has indicated that open and far-ranging

argument is permissible at the penalty phase, and that a state statute requiring the jury to consider future dangerousness as a factor in the penalty determination is also permissible. (See id., at p. 288, citing Gregg v. Georgia (1976) 428 U.S. 153, 203-204, and Jurek v. Texas (1976) 428 U.S. 262, 275; see also People v. Adcox (1988) 47 Cal.3d 207, 257.)

The district attorney also argued that the jury should consider defendant's lack of remorse in determining the penalty. He used this argument to counter the court's instruction to the jury to consider pity for the defendant in arriving at the penalty determination: ". . . also throughout the course of the trial and all the facts you've heard, apparently Mr. Pensinger to this very minute does not show any remorse or sorrow for what occurred to Michelle or to anybody else that was involved in what he did. And if you are asked to have pity or compassion for Mr. Pensinger, think about how he deals with his victims. Whether now he even feels remorse or sorrow or pity for them . . . [a]nd again, finally, something, when you think about this question of pity where's the remorse, where's the sorrow for what's happened?" Defendant's argument is that this was an unfair penalty for defendant's choice to exercise his right to trial and not to confess. While an argument asking the jury to return a death verdict because the defendant had failed to confess or had maintained his silence would be improper (see

People v. Coleman (1969) 71 Cal.2d 1159, 1168; People v. Talbot (1966) 64 Cal.2d 691, 712), the argument here did not ask this. The prosecutor is entitled to counter the argument that the jury should spare defendant's life out of pity for him, and we have said that the jury may consider lack of remorse in fixing penalty. (People v. Walker, supra, 47 Cal.3d 605, 650; People v. Coleman, supra, at p. 1168; cf. People v. Key (1984) 153 Cal.App.3d 888, 900-901.) When comments on lack of remorse do no more than suggest the inapplicability of a potential mitigating factor, they are appropriate. (People v. Walker, supra, 47 Cal.3d at p. 650.)

Finally, defendant argues that the prosecutor committed misconduct in arguing to the jury that the death penalty was appropriate in this case because the crime was "heinous and atrocious." Defendant argues that the prosecutor invited the jury to decide the penalty on the basis of a standard we found impermissibly vague as a special circumstance in People v. Superior Court (Engert) (1982) 31 Cal.3d 797, 803. If defendant is arguing that the prosecutor's argument must reach the same standard of precision as a penal statute, he is wrong. He also argues that the argument was improper because it was not directed to any of the factors in aggravation enumerated in Penal Code section 190.3. But it was: it called the jury's attention to the circumstances of the charged crime. And again, there was no objection.

L. Ineffective Assistance of Counsel.

Defendant's last argument is that the penalty verdict must be reversed because he received ineffective assistance of counsel at the penalty trial. He points to counsel's failure to object to the acts of prosecutorial misconduct discussed above, but concedes that as there may have been tactical reasons for the failure to object, this argument should be made in a petition for writ of habeas corpus. However, he did not raise the issue of the failure to object in the petition for writ of habeas corpus he filed. He then argues that counsel's argument to the jury at the conclusion of the penalty trial was constitutionally inadequate and requires reversal. This issue is considered fully below, on a more complete record, in the context of the petition for writ of habeas corpus.

VI. HABEAS CORPUS

Defendant claims that he is entitled to relief on habeas corpus because false material evidence was admitted against him at the guilt phase of trial, because the prosecution failed to disclose material exculpatory evidence, and because he received ineffective assistance of counsel at the guilt and penalty phases of trial. Finding that defendant had stated a prima facie basis for relief,[18/] we issued an

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18/ See In re Hochberg (1970) 2 Cal.3d 870, 873-874, footnote 2.

order to show cause and appointed a referee to determine the factual basis for defendant's claims. 19/

A. Failure to Disclose Evidence.

The prosecution must disclose to the defense all substantial material evidence favorable to the accused. (People v. Morris (1988) 46 Cal.3d 1, 29; People v. Phillips, supra, 41 Cal.3d 29, 46.) Suppression of evidence, even when it is unintentional or inadvertent, violates due process. (Brady v. Maryland (1963) 373 U.S. 83, 87, People v. Ruthford (1975) 14 Cal.3d 399, 406.) The duty to disclose evidence favorable to the accused extends to the disclosure of evidence relating to the credibility of witnesses, including, of course, any inducements made to secure the witnesses' testimony. (Giglio v. United States (1972) 405 U.S. 150, 154; People v. Morris, supra, 46 Cal.3d at p. 30; People v. Phillips, supra, 41 Cal.3d at p. 46.) Under the federal Constitution, "the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." (United States v. Bagley (1985) 473 U.S. 667, 678.)

The referee determined that there was no credible evidence that the prosecution or any law enforcement officer

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19/ We summarily denied defendant's "supplemental" petition for writ of habeas corpus alleging that the prosecution failed to disclose evidence regarding Vickie Melander.

had ever offered inmates Hicks or Howard leniency in return for their testimony and that, thus, there had been no failure to disclose any material evidence on the question of inducements offered to these witnesses. The referee also determined that all "contact which was had with Howard and Hicks was fully disclosed at petitioner's trial."

Defendant objects that the evidence at the hearing showed that the prosecution failed to disclose that just before trial, Howard balked at testifying and demanded that he be given help in child custody proceedings. Defendant also objects that the prosecution failed to prevent Howard from testifying that he had not expected or requested any benefits for his testifying, since he had in fact requested, or rather demanded, help in his child custody proceedings.

The referee's determination of issues of both law and fact are subject to our independent review, but factual findings are entitled to great weight when supported by substantial evidence. (In re Hall (1981) 30 Cal.3d 408, 416.) "This deference derives from the fact that the referee benefits from the opportunity to observe the demeanor of witnesses and to consider their statements in light of their manner on the stand. [Citation.]" (In re Cordero (1988) 46 Cal.3d 161, 181.)

We agree with the referee that the prosecution fully disclosed its arrangements with Howard and Hicks. At trial it was disclosed that the prosecutor had testified regarding Howard's cooperation at Howard's own capital trial. It was

also disclosed that Howard had received a contact visit and some special food which may not have been available to all other inmates. We credit the prosecutor's testimony at the reference hearing that he refused to accede to Howard's request for assistance in his child custody proceedings. We also credit the uncontroverted testimony of the prosecutor that although Hicks's counsel asked that his cooperation be taken into account at his sentencing hearing, the prosecutor did not offer this as an inducement to Hicks, nor did he or the sheriff's department do anything to support Hicks' counsel's request for consideration. In any case, there was no failure to disclose any arrangement with Hicks.

Defendant places great weight on our statement in People v. Phillips, supra, 41 Cal.3d at page 46, that "[s]ince a witness's credibility depends heavily on his motives for testifying, the prosecution must disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements." (Italics added.) He points out that although Howard apparently tried to strike a last-minute deal to get help in his custody matter in return for his testimony, the prosecutor did not correct his "false or misleading" testimony at trial that he was testifying only because he abhorred defendant's crime, and that he had never requested any quid pro quo.

We agree with defendant that the prosecution should have corrected the false impression created by this portion of Howard's testimony by disclosing that Howard had unsuccessfully attempted to extort a last-minute advantage in return for his testimony. Nonetheless, since the attempt was unsuccessful and Howard in fact testified without having succeeded in securing a quid pro quo, the portion of his statement explaining his motivation for testifying was not demonstrably false or misleading. His denial that he requested any help from the prosecution, while false, did not mask any inducement. Moreover, defendant fully exploited the strongest evidence of Howard's initial motivation for cooperation with the prosecution, that is, the hope that the prosecutor's testimony at Howard's own penalty trial would cause his jury to reject the death penalty. At trial, the defense was amply able to impeach Howard's claim that he was testifying only because he abhorred defendant's crime. The defense was also able to impeach Howard's credibility generally, with direct evidence of his prior untruthful statements and accusations, and his poor reputation for credibility. In addition, the defense had direct evidence from Howard's ex-wife and nephew that Howard had said he was cooperating with the police in defendant's case in the hope of a bargain in his own case. The prosecutor, in closing argument, conceded that Howard was a liar. Under the

circumstances, the limited failure to disclose was harmless (see 2 La Fave & Israel, Criminal Procedure (1984) § 19.5, p. 531 et seq.) and did not undermine the reliability of the proceedings (compare Pennsylvania v. Ritchie (1987) 480 U.S. 39, 57, 58; United States v. Bagley, supra, 473 U.S. at p. 678; Beck v. Alabama (1980) 447 U.S. 625, 638).

B. Use of Perjured Testimony.

A prisoner is entitled to relief by writ of habeas corpus when "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration." (Pen. Code, § 1473, subd. (b)(1).) There is no requirement that the prosecution have known that the evidence was false. (Pen. Code, § 1473, subd. (c); see also In re Hall, supra, 30 Cal.3d 408, 424.)

Defendant's petition for writ of habeas corpus alleged that he was entitled to relief on these grounds because Howard's testimony that defendant had confessed to him was perjury, because Hicks had caused a knife to be "planted" at the scene and this knife was introduced as the possible murder weapon, and because both Hicks and Howard had perjured themselves in denying that they had been offered inducements for their testimony. Howard testified at the reference hearing and recanted his previous testimony inculpating defendant. The referee concluded that no false evidence which was substantially material or probative on the

issue of guilt had been introduced against petitioner at trial. The referee did not believe Howard's recantation of his statement to the police, preliminary hearing testimony, and trial testimony. The referee's determination is entitled to special respect when the credibility of witnesses is at stake. (See In re Hall, supra, 30 Cal.3d at p. 416.)

In view of Howard's substantial consistent testimony at the preliminary hearing and trial, and the referee's conclusion with respect to the credibility of his recantation, we conclude that defendant has failed to demonstrate that Howard's testimony was perjured. Similarly, given the unanimous testimony of numerous police officers and the deputy district attorney who prosecuted defendant, along with the testimony of Hicks, we conclude that there was no perjured testimony with respect to the inducements given Hicks and Howard for their testimony. Finally, as the referee characterized as believable the testimony of Hicks's mother and stepfather denying the accusation that they had "planted" the knife found at the scene, and as this testimony was consistent with Hicks's denial at the reference hearing that he arranged for the knife to be secreted at the scene, we conclude that the knife handle which was introduced against defendant at trial was not "false evidence material on the question of guilt."

Defendant does not take exception to any of the referee's findings on the matters discussed above, but limits his attack to a very narrow argument that testimony at the reference hearing established that Howard committed perjury when he denied that he had asked for anything from the authorities in return for his testimony against defendant. We have already established that the failure to correct this testimony was harmless.

C. Ineffective Assistance of Counsel.

We also issued our order to show cause on the question whether defendant's conviction, or at least the penalty judgment, should be reversed because he received ineffective assistance of counsel. Petitioner alleged that counsel failed to investigate the facts and law relating to a possible diminished capacity defense. Defendant abandoned this claim at the reference hearing, and it will not be discussed here. He also alleged ineffective assistance of counsel because counsel failed to consult a defense forensic pathologist to determine whether the victim had been alive at the time of the mutilation, because counsel failed to consult a defense serologist to examine the knife handle alleged to have been part of the murder weapon and to advise counsel whether the weather could have eradicated traces of blood from the weapon, and because counsel asked the prosecutor's expert on cross-examination whether the weather could have

had this effect, without knowing the answer (which was yes). As to the penalty trial, defendant alleged that counsel was ineffective in failing to investigate and present evidence in mitigation.[20/] The referee rejected each claim of ineffective assistance, and we agree.

As on direct appeal, in order to be entitled to a writ of habeas corpus, the defendant has the burden of demonstrating that counsel's performance "fell below an objective standard of reasonableness . . . under prevailing professional norms." (Strickland v. Washington, supra, 466 U.S. 668, 688.) Although counsel's decisions are entitled to

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20/ The text of our reference order on the ineffective assistance point was: "Did defendant's trial counsel, Donald N. Feld, inadequately represent defendant (i.e., did counsel fail to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate) by failing either: [¶] (a) to investigate adequately the law of diminished capacity applicable at the time of trial; [¶] (b) to investigate adequately a possible defense of diminished capacity through available medical records, witnesses, and experts, including investigation of a possible multiple personality disorder; [¶] (c) to consult an independent pathologist on the question whether certain wounds were inflicted before or after death, and whether blood stains on a knife could have been removed by the weather; or [¶] (d) to investigate adequately the available evidence in mitigation for presentation at the penalty phase of trial by, inter alia, interviewing defendant's parents. . . . Did counsel make an informed tactical decision when on cross-examination he asked the prosecution expert, Dr. Speth, whether the weather could have eradicated traces of blood on a knife alleged to have been used in the crime?"

deference to avoid second-guessing his or her tactical choices and to avoid discouraging vigorous advocacy, "deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions." (People v. Ledesma, supra, 43 Cal.3d 171, 217.)

The defendant must also show that counsel's failure to provide reasonably competent assistance prejudiced him, that is, "absent counsel's errors, there is a reasonable probability of a more favorable outcome. [Citation.] A 'reasonable probability' is not a showing that 'counsel's conduct more likely than not altered the outcome in the case,' but simply 'a probability sufficient to undermine confidence in the outcome' [citation]." (In re Cordero, supra, 46 Cal.3d 161, 180, quoting Strickland v. Washington, supra, 466 U.S. at pp. 693-694.)

The referee found that "[d]efense counsel adequately represented defendant in that no prejudice resulted to defendant from the fact that counsel did not consult an independent pathologist on the question whether certain wounds were inflicted before or after death, and whether blood stains on a knife could have been removed by the

weather. . . . [¶] Mr. Feld probably did not make an informed tactical decision when on cross-examination he asked the expert, Dr. Speth, whether the weather could have eradicated traces of blood on a knife alleged to have been used in the crime, but neither the question nor the answer prejudiced the defendant."

Upon our independent review of the record, we agree that there was no prejudice. Defendant presented no evidence at the reference hearing that an independent pathologist would or even might have concluded that the wounds were inflicted postmortem. In any event, the prosecution witness was equivocal on the point, and counsel was able to exploit this equivocation in argument to the jury. Defendant now presents evidence that it is probable that traces of blood would have remained on a knife used as the murder weapon even if it was subjected to exposure in the desert, as was the People's exhibit at issue here. We do not think it reasonably probable that a result more favorable to defendant would have occurred had the jury been aware of this evidence. While the prosecution suggested that the knife handle in evidence might have been a part of the murder weapon, they also relied on it to show that defendant had been in the vicinity of the crime scene and to corroborate Hicks's testimony that defendant told him he had left a knife near the scene. It was not essential to the People's case

that the jury believe that the knife was the murder weapon; if the jury believed that the knife had belonged to defendant and that he had left it near the scene, the damage was done to defendant's claim that he had never been near the scene.

The referee found that counsel adequately represented defendant in his investigation, preparation and presentation of the penalty phase of the trial. (This finding went beyond our order to show cause and our reference order, which directed the referee to determine whether counsel had inadequately represented defendant by failing to "investigate adequately the available evidence in mitigation for presentation at the penalty phase of trial by, inter alia, interviewing defendant's parents.") The referee recited that counsel had testified that he did interview defendant's parents, other members of his family, and various friends, and that counsel was interested in finding witnesses who saw defendant with young children and who could testify that he was not violent. Counsel in fact called two such witnesses to the stand. The referee also recited that counsel had not called defendant's parents or other witnesses because in counsel's judgment their testimony would not have helped. "It is not true that Mr. Feld did not investigate for witnesses." With regard to any prejudice: "The nature of the evidence that occurred in Oregon, Texas, and then the brutal death of Michelle, the kidnapping of the Melander

children, the 'dumping' of five-year-old Michael on the dark road near Parker Dam, carried into the jury room deliberations. The referee doubts that arguments of counsel or additional witnesses at the penalty phase could have helped petitioner."

The referee's finding is essentially that any failure to investigate could not have prejudiced defendant. The defense experts at the reference hearing were unanimous in their opinion that defense counsel failed to investigate adequately in preparation for the penalty phase of trial, and even the People's expert, Mr. Whitney, thought counsel's investigation barely adequate. Yet the evidence he failed to discover was not of such weight that its discovery would have made defense counsel's penalty phase tactics incompetent, nor was it of such magnitude that its presentation would, with any reasonable probability, have changed the verdict.

While diligent counsel undoubtedly should have delved further into defendant's background rather than simply consulting briefly with parents and a few relatives and friends, further investigation has not turned up any evidence of any great weight. Appellate counsel has not produced any evidence of mental disorder, childhood abuse, or even trauma arising from defendant's parents' divorce. All that has been produced is evidence that on a couple of occasions, defendant acted bravely and selflessly (trial counsel was aware of one of these events), that his wish to join the Army at age

seventeen was thwarted (there is no evidence he attempted to join when he reached the age of majority), and that he was once in the Job Corps. Defendant proffers the testimony of his parents and friends, but counsel had interviewed the parents and rejected their testimony -- there is no failure to investigate with respect to them. He also talked to other family members and friends. It is evident that defendant's mother would have been subject to impeachment with respect to defendant's juvenile misconduct, and with respect to her relationship with defendant. Kerry Barnowski, George Grambergs, and Robert Barnowski, who testified favorably at the reference hearing about defendant's character, could have been damaging witnesses if the prosecutor had explored their knowledge of defendant's whereabouts and state of mind near the time of the charged offenses. Karl Grambergs was aware of defendant's juvenile misconduct and of an act of violence defendant had committed. None of these witnesses who came forward at the evidentiary hearing were unmitigated blessings for the defense case. It is extremely improbable that if counsel had delved as far as appellate counsel has, he would have changed his mind about his tactics. (Neither counsel asked this question of trial counsel at the hearing, unfortunately.) Nor does it seem at all probable that this essentially cumulative evidence would have changed the jury's

view of the appropriate penalty, given the truly atrocious nature of the crimes.

Defendant also argues that counsel's closing argument was incompetent because counsel told the jury that if they had no lingering doubt, perhaps death was the appropriate penalty. This argument is somewhat beyond the reach of our order to show cause, since defendant did not allege, in his petition, an incompetent closing argument as a fact supporting his claim for relief on the basis of ineffective assistance. As a consequence, we did not refer the question of defense counsel's closing argument to the referee. Yet it is dependent to some extent on the claim that counsel failed to investigate enough to make a competent tactical choice about the penalty phase defense, and it is also a claim that defendant did raise in his direct appeal.

Defendant's expert witnesses argued that the "lingering doubt" defense, which counsel chose to rely on in his penalty phase argument, was an incompetent tactical choice. The implication of their testimony was that it is always incompetent to present a lingering doubt defense in isolation at the penalty phase; it is required that counsel also attempt to portray defendant as a human being and, of course, that counsel investigate and present evidence supporting this portrayal. The People's expert, Mr. Whitney, also agreed that it is important in the penalty phase to

present the defendant as a human being, and give the jury some reason to spare the defendant's life.

From defense counsel's testimony at the reference hearing, it is clear that counsel made a tactical decision to argue lingering doubt. Since he had staked his all on this theory and while it was extremely risky to tell the jury that if they had no lingering doubt that death might be appropriate, it was not incompetent unless it was incompetent to choose to present that particular defense in isolation. The ultimate question is whether it can ever be competent to chose to present a lingering doubt defense in isolation at the penalty phase. We have said that it is counsel's obligation to "'portray the defendant as a human being with positive qualities'" and "'attempt to show that the defendant's capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is.'" (People v. Deere (1985) 41 Cal.3d 353, 366.) When counsel presents no evidence in mitigation at the penalty phase, we and some federal courts have found ineffective assistance of counsel. (Id., at pp. 365-368; Blake v. Kemp (11th Cir. 1985) 758 F.2d 523, 533-535, cert. den. ___ U. S. ___ [106 S.Ct. 374]; Dillon v. Duckworth (7th Cir. 1984) 751 F.2d 895, 901, cert. den. 471 U.S. 1108; Pickens v. Lockhart (8th Cir. 1983) 714 F.2d 1455,

1465-1468.) Yet here, counsel investigated to some extent, and introduced some evidence of good character, though he used it to bolster his lingering doubt argument. He also had a clear tactical reason for proceeding as he did. Further, the habeas corpus proceedings have not uncovered any character or background evidence of great significance. This is not a case in which the omitted mitigating evidence could have "totally changed the evidentiary picture" (Middleton v. Dugger (11th Cir. 1988) 849 F.2d 491, 495) by painting defendant's character in a new light. (Compare In re Fields (1990) 51 Cal.3d 1063, 1080.) Under the circumstances, we cannot say that counsel's tactical choice was incompetent as a matter of law.

A recent case from the Eleventh Circuit reaches the same result: "Counsel simply made the informed decision that the best way to save Julius' life was to argue to the jury that there was still some doubt whether or not Julius committed the crime. Given the brutal nature of the crime, we conclude that such a decision was within the range of professional competence." (Julius v. Johnson (11th Cir. 1988) 840 F.2d 1533, 1542.) In a similar case, the court said: "In light of this strategy it was reasonable for counsel to elect not to present evidence regarding mitigating factors which imply guilt but which attempt to excuse that

culpable conduct. A strategic decision made by counsel after a reasonable investigation into the alternatives deserves deference by the courts. . . ." (Funchess v. Wainwright (11th Cir. 1985) 772 F.2d 683, 689-690, cert. den. ___ U.S. ___ [106 S.Ct. 1242].) The same court has cautioned that a tactical decision not to present mitigating evidence of which counsel is aware enjoys a strong presumption of correctness. There, counsel chose not to present evidence of the defendant's mental illness because it was inconsistent with counsel's guilt phase argument that defendant was a minor participant who tried to withdraw from the crime. Further, the court cautioned that mitigating evidence can have a negative impact on the jury, so "'the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence.'" (Smith v. Dugger (11th Cir. 1988) 840 F.2d 787, 795; see also Darden v. Wainwright (1986) 477 U.S. 168, 186 [counsel's reliance on plea for mercy was reasonable, since mitigating evidence might have opened door to damaging rebuttal].) Other cases, while conceding counsel's incompetence, find no prejudice, after undertaking to evaluate the probable effect of the missing evidence on the jury. (See Smith v. Armontrout (W.D.Mo. 1988) 692 F.Supp. 1079; Bundy v. Dugger (11th Cir. 1988) 850 F.2d 1402, 1412; Elledge v. Dugger (11th Cir. 1987) 823 F.2d 1439, 1447, cert. den. ___ U.S. ___ [108 S.Ct.

1487]; Thompson v. Wainwright (11th Cir. 1986) 787 F.2d 1447, 1453, cert. den. sub nom. Thompson v. Dugger 481 U.S. 1042.)

On the other hand, some courts find that when little or no evidence in mitigation is presented, the penalty phase fails to function reliably. (Thomas v. Kemp (11th Cir. 1986) 796 F.2d 1322, 1325, cert. den. ___ U.S. ___ [107 S.Ct. 602].) "It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if mitigating evidence had been presented to the jury. [Citation.] The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia 428 U.S. 153 [citations]. Here the jurors were given no information to aid them in making such an individualized determination." (Thomas v. Kemp, supra, 796 F.2d at p. 1325; see also Armstrong v. Dugger (11th Cir. 1987) 833 F.2d 1430, 1433.) Counsel's failure to investigate and introduce available evidence in mitigation has also been found prejudicial, not simply because of an abstract effect on the reliability of the process, but because the court found the omission prejudicial under the particular circumstances of the case. (Middleton v. Dugger, supra, 849 F.2d 491, 495; see also Deutscher v. Whitley (9th Cir. 1989) 884 F.2d 1152 [failure to investigate mental defense].)

Although in some cases we have been concerned that a penalty trial in which none of the available mitigating evidence is presented may be unreliable (see People v. Deere, supra, 41 Cal.3d 353, 364; People v. Burgener (1986) 41 Cal.3d 505), we have rejected the idea that such an omission necessarily makes the process unreliable (People v. Lang, supra, 49 Cal.3d 991, 1030; People v. Bloom, supra, 48 Cal.3d 1194, 1228, fn. 9). We have had confidence in the process when, as here, at least some, though not all, of the mitigating evidence has been presented. (People v. Guzman (1988) 45 Cal.3d 915, 960-961.)

We conclude that the presentation of a lingering doubt argument in isolation at the penalty trial cannot be considered incompetent as a matter of law, nor has defendant demonstrated that it was prejudicial in his case. The People's experts gave it their imprimatur as a reasonable argument after a denial of guilt, especially when, as here, the charged crimes were particularly heinous. Counsel had a tactical reason for failing to present much of the mitigating evidence defendant proffered at the reference hearing, and some mitigating evidence was presented, though counsel used it for the purpose of bolstering his lingering doubt argument. The circumstances of the charged crimes were brutal and shocking in the extreme. While counsel's investigation was barely adequate, it is not reasonably

probable that more extensive investigation would have uncovered evidence of such import that he would have been forced, as a competent attorney, to change his tactics. Even if counsel was incompetent in failing to adequately investigate, we conclude that defendant fails to demonstrate prejudice.

The order to show cause is discharged and the petition for writ of habeas corpus is denied. The finding as to the torture-murder special circumstance is reversed. In all other respects we affirm the judgment and the penalty imposed by the superior court.

BROUSSARD, J.

WE CONCUR:

LUCAS, C.J.
PANELLI, J.
KENNARD, J.
ARABIAN, J.
* EAGLESON, J.P.T.

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* Honorable David N. Eagleson, retired Associate Justice of the Supreme Court, sitting under assignment by the Chairperson of the Judicial Council.

Sheriff

James R. Metts, PhD

LEXINGTON COUNTY SHERIFFS DEPARTMENT

August 12, 1981

II

Det. Hal Collett
Yuma County Sheriff's Department
P.O. Box 110
Yuma, Arizona 85364

Dear Hal:

The information that I was able to find on the Melanders is rather sketchy. The only neighbors who remember them living there was a John Ferguson in lot 59 and his thirteen year old daughter, Susie. Susie kept the child for them most of the time while they were out. They stated that the Melanders both drank very heavily and had a lot of domestic fights. Vickie had mentioned to Susie several times that she was not sure if the baby was Mike's and that they would go out together and get drunk and just go their separate ways. A lot of times Vickie would bring someone else home before Mike would get there.

Mike worked for Creighton Shull Landscaping Company. He started there in about November of 1979. According to them, he was a poor employee. A lot of times he would not show up and would not call in to give thema reason. He was layed off in November of 1980 and apparently did not work any where else until the time they moved.

They had told the Fergusons sometime in January that they were expecting a tax refund check and they wanted to move as soon as they got the check. The check came only two days before the baby was born. By that time their electric had been shut off and they had already received notice of eviction from the trailer park. So as soon as she was able to get out the hospital they apparently moved.

We were told that they moved in originally with either her brother or his brother when they moved to Columbia, who lived at Foxfire Apartments. Nobody knows his name and he apparently moved out of town while they were still living at the trailer park. So I can't find anything out on him.

We have several people named Panama around here, but nobody can equate it with either Fox or Macy. I cannot find any reports or

EHHIBIT 4

INCIDENT REPORT

Case number: 01011 7366

Incident location: #32 W. Cola. Lex. Trlr. Pk. 3208 Augusta Rd. W. Cola. SC 29169

Incident date: 1/11/80 Time: 1530

Relationship: 2 Acquaintances

Census tract: N13B2

Complainant: Huggins, Margie M. Address: Same Phone number: 796-5445

Victim name: McLander, Mike Jr. Race: W Sex: M Age: N/A Residence phone: N/A Business phone: N/A

Address: Lot #32 W. Cola. Lex. Trlr. Pk. Employer or occupation: N/A

Subject name: #1 McLander, Vickie Race: W Sex: F Date of birth: Unk Age: 24

Address: Lot #32 W. Cola. Lex. Trlr. Pk. Height: 5'11 Weight: 180 Hair: Brn Eyes: Brn

Date of offense: 1/11/80

#2 McLander, Mike Sr.
Lot #32 W. Cola. Lex. Trlr. Pk.
W-M, 27, 509, 160, Bld hair and full beard, Blk

Narrative: Compl. states on the above date and time at the above incident location, victim above being physically and more so mentally abused by above two subjects. Compl. states she has observed victim being hit in the head with a pair of pliers by subject #1 (victims mother), and from every Thursday night until the bars close on Saturday night, victim above is kept in the bars while above two(2) subjects get drunk.

Report date: 1/11/80

Reporting officer: Yarborough, D.S. Number: 35

[illegible handwritten signature]

Worker went to see the Mike Melanders after work one day. Mike basically told the same story as Vickie. He was a little bit hostile and didn't answer any questions that weren't asked. He denied any knowledge of any time when the child was hit in the head with a pair of pliers or had his mouth taped up. He denied taking the child to any bars with the exception of occasionally taking the child to Hoot's and he said they usually are home by midnight. He said when they took the child to Hoot's that they would stay 2 or 3 hours and the kids would play outside and that there were other parents who brought their children who played with Little Mike and the parents would take turns watching the kids. Mr. Melanders said that Susie Ferguson babysat for them occasionally.

Vickie was expressing some dismay over financial problems they were having. She says they owe $165.00 to the electric company and the next payment is due on the 22nd. They do get food stamps and Mike is working. Her rent is $150.00 a month. Worker made referral for low-rent housing. Worker also gave Vickie information on Salvation Army and Midlands Human Resources fuel assistance program. Worker also informed Mrs. Melanders that she could now get more in food stamps since she knew she was pregnant. sba

-02-80 lkner — Worker went to see Mr. Jimmy Walker who is part owner of Hoot's on Wattling Road. Mr. Walker said that Vickie and Mike would drink 6 or 7 beers between them and would play the electronic game machine some. Mr. Walker said they usually do not bring the kid but that when they do, there are usually other kids there as well and the kids stay inside most of the time. Mr. Walker says he closes Hoot's at midnight and that the Melanders usually leave between 9:30 and 10:00 p.m. He says he usually sees them walking home and he does not know whether they go to other bars or not. Mr. Walker says when they leave his bar, they are usually alone and to his knowledge they are good parents and take adequate care of the child.

Worker then went to see Mrs. Durst who is the manager of the trailer park. She lives at Lot 24 and her phone number is 794-7158. Mrs. Durst was not home at the time. Her son answered the door and said she works at Lexington High Cafeteria and worker can call her at LHS before 9:00. Worker could then make an appointment to see Mrs. Durst. sba

5 P.M. — Worker received message that Mrs. Mary Durst had phoned asking worker to return call. sba

-03-80 lkner — Worker went to see Mrs. Mary Durst at her home. Mrs. Durst denied any knowledge of anything about the Melanders taking their child to bars or any inappropriate behavior around the child or any physical or emotional abuse of the child. She said that she thought that the Melanders were good parents and she had never seen any inappropriate discipline. She said she had lived 2 doors down from them for approximately 6 months. She said to her knowledge Mike works regularly and that they have a babysitter when they go out. She said she does not think the Melanders take the child with them when they go to bars. sba

-08-80 lkner — Vickie Melander called and said that Mike had been laid off and they were behind in their rent and she wanted to know if I had any resources for her. Worker recommended she go to Salvation Army and see if she could get some rent assistance. She also said that the electric company was sending threatening letters about turning off their electricity if she did not pay $55.00 by sometime next week. Worker suggested she go to Midlands Human Resources and also Salvation Army may be

ner — able to help her with that. Worker asked her if Mike had gone and applied for unemployment compensation and she said that he had not. She said he had not been able to get a ride and his foot has swollen up on him and he had not been able to ride his bicycle in the rain that far. Worker volunteered to take her to the Salvation Army since Vickie is very pregnant and it is raining and Mike is having some difficulty with his foot. sba

6-80 kner — Worker took Vickie Melander to the Salvation Army for $50 for SCE&G. The Salvation Army worker said that if Mrs. Melanders would come back another day that she would be eligible for the rent assistance program as well. Worker got $75 from DSS emergency fund to pay part of back rent with the understanding that the Melanders would make efforts to pay this back when they get their income tax refund. sba

7-80 kner — Worker delivered $75 check to Mary Durst. sba

8-80 kner — Worker talked to Ms. Charlie Hooker who is a volunteer and has offered to send some Christmas gifts to the Melanders. sba

3-80 kner — Worker took Christmas goodies to the Melander home. Vickie and Mike were very grateful and very surprised.

Worker called Ms. Hooker from the office and relayed thanks.

Worker is going to unsubstantiate this case as of this date. No substantiating data can be found as to the allegations. The home is clean, the relationship between the mother and the child and father and the child seems to be good. The child seems unafraid and does not seem to be excessively loud and rowdy and trying to get attention either. Worker has seen no marks or bruises of any kind on the child. With the exception of the neighbor across the way who made the original complaint, worker can find no neighbors or friends who find anything undue in the way these people conduct their lives. sba ✓

8-6-81 0150: Teletypes sent to Lexington County SO and West Columbia PD for info on the parents of the victim:

8-6-81 0150: Called Lexington County Hospital and was advised that they do take footprints of newly born babies. Will need to have parents permission to get copies or have the Lexington County SO personel make arrangements to get copies.

8-6-81 0200: Called Lexington County SO: 803-359-8230
Wasadvised that office opens at 0800 and to call back for Capt. Jack BOWDEN (Investigator). (3 hour time differance

While talking wasadvised that they had recived Teletypes and will forward them to Capt BOWDEN.

WEST COLUMBIA PD

Father: MELANDER, Micheal Ray
WMA 7-4-54
526-90-1856
5-8 130 lbs
Bld Blue

Mother: MELANDER, Vickie Louise Maiden name: BARBEE
WFA 10-1-58
5-11 140
Brn Hzl

Victim: MELANDER, Michele Marie
WFJ 2-20-81

Born: Lexington County Hospital
West Columbia, South Carolina
803-791-2000

Born 0801
Wgt: 7 lbs 6 ozs
Length: 20"
Head: 13 3/4"
Chest: 13 3/8"

Dr. Cohen - Baby's Doctor
Dr. Thompson - Mothers Doctor

Adress: 3208 Augusta Rd #32
West Columibia, S. C.
29169

Wifes Brother: BARBEE, Jim & Noreen
1112 S W Jewell
Topeka, Kansas 66604
913-233-1731

Wifes Father: BARBEE, Owen R
8037 S Topeka Blvd
Rt 1 Box 9
Wakakusa, Kansas
66546

Wifes Mother: BARBEE, ~~Carolyn~~
Carr, ~~Carolyn~~

BETHKE, JOAN
778-3999

8-5-81 2130: Went to Kenden to see Fathers parents:
Recieved above info from letters and papers of parents
Had two checks when they left the house for $58.00 each

any arrests on either subject. The only arrests I can find on Melander are some traffic violations in the city of West Columbia in December of 1979. Running criminal history checks on all three subjects the only thing I find is where Paul Macy had an arrest and conviction for embezzlement. It shows the Columbia office of the FBI as the arresting agency. But talking with them it was apparently an arrest made for New York. The agent in Columbia told me that an inquiry had been initiated through the Phoenix office. So I guess that would be you checking on that.

Sometime about a year ago there was a child abuse investigation that was handled by the Department of Social Services office here in Lexington, but they tell me the allegations were unfounded and their investigation was dropped.

Enclosed you will find three reports that we took from the Melanders while they were here. That is all we have on them. Also I have made a copy of the criminal history check on Macy, but I guess that is the same one that you have. We will still check to see if we can find out any thing on Panama. I will give you a call or write again to let you know if we come up with any thing. Also enclosed is the infant's birth certificate, which was being held by the Fergusons.

If we can be of further assistance, please call or write.

Sincerely,

Jack Bowden/cst

Jack Bowden
Captain
Investigations

JJB/cst

Enclosures